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**IN THE**

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**FOR THE**

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**VOL. LVII.**

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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

APRIL TERM, 1879.

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THE STATE, USE, ETC. *v.* J. P. MATTHEWS ET AL.

1. SHERIFF'S BOND. *Default as tax collector.*

The sureties on a sheriff's bond, under Code 1871, § 219, are liable for his default as tax collector, although he has given a tax collector's bond not required by law. *Harris v. State*, 55 Miss. 50, explained.

2. SAME. *Release of sureties. New bond under Code 1871, § 316.*

Such sureties are not released, nor are additional sureties bound, by erasing the names of the former and substituting those of the latter by direction of the board of supervisors.

ERROR to the Circuit Court of Lincoln County.

Hon. J. B. CHRISMAN, Judge.

This was an action on the sheriff's bond, for his default for the taxes of 1872, against J. P. Matthews, R. W. Millsaps, and Jas. A. Hoskins, his sureties. The declaration alleged that John D. Moore, now a non-resident, was elected sheriff of Lincoln County, and on Dec. 30, 1871, executed the bond, jointly with Millsaps, Hoskins, M. Lowenthal, and J. W. Burnett, each of the last two placing opposite his name \$2,000; that this bond, which was conditioned for the faithful performance of "all the duties of the office of sheriff" during the two succeeding years, was accepted and approved; that afterwards, on Sept. 2, 1872, on the application of Lowenthal and

Burnett to be released from the bond, the sheriff appeared before the board of supervisors and tendered J. P. Matthews who justified for the sum of \$4,000, as surety in place of the applicants; that thereupon the clerk, in the presence of Matthews and the board, drew a red line through the names of the petitioning sureties, and Matthews signed and sealed the bond, and that the board by its order discharged Burnett and Lowenthall and accepted Matthews.

A demurrer by Matthews, on the ground that he did not, either by signing the bond or by the action of the board of supervisors, become liable as co-obligor, was overruled, and the defendants filed pleas. Millsaps and Hoskins pleaded, (1) that Moore gave two bonds as tax collector for the same term as his sheriff's bond, with different sureties, which were before the alleged default received and approved by the proper authorities, and that they signed the bond sued on with the intent to cover his acts as sheriff, and not as tax collector; (2), (3), and (4), that the board released the sureties on the bond in suit, prior to the collection of any of the taxes, by its action in substituting Matthews for Lowenthall and Burnett, and (6) that Moore was not sheriff of Lincoln County for the term named in the declaration, because he never qualified as such by executing the required bond. Demurrers by the plaintiff to these pleas were overruled, and replications were filed putting them in issue. Matthews's pleas, demurrers to which were overruled, were the same, with the addition that the bond was without consideration as to him, and that Moore never collected the taxes as alleged; and issue was joined on them.

On the trial, the plaintiff produced the bond sued on, and the county treasurer's certificate, showing that \$3,570.91 of the county taxes for the fiscal year 1872 remained due and unpaid from Moore, the sheriff and tax collector. To the reading of each paper the defendants objected; their objections were overruled, the papers were read, and the plaintiff rested. The defendants then introduced the two tax collector's bonds, and the proceedings of the board of supervisors touching those bonds and the sheriff's bond, testified that Millsaps signed the sheriff's bond under the common understanding that it did



not cover Moore's duties as tax collector, and with evidence to show that the county treasurer's certificate was not made from the corrected roll delivered to the sheriff, but was taken from an incomplete roll, and based on an adjustment made shortly before the trial, and contained inaccuracies, rested, and moved to exclude all the plaintiff's evidence; which motion was sustained. The verdict and judgment were for the defendants. A motion for new trial was overruled, and the plaintiff brought up the case.

*R. H. Thompson*, for the plaintiff in error.

1. The sureties on a sheriff's bond, given when no special bond as tax collector was required, are liable for a default in paying over county taxes collected. *Byrne v. State*, 50 Miss. 688; *Taylor v. State*, 51 Miss. 79; *French v. State*, 52 Miss. 759. The condition of the bond sued on is broad enough to cover the collection of taxes as a function of the office of sheriff. Code 1871, § 309. If the sureties are so liable, the fact that the sheriff executed and the board of supervisors accepted a bond not required by law cannot release them.

2. Millsaps and Hoskins were not released by the action of the board. If their action was valid, Burnett and Lowenthal were released, and Millsaps and Hoskins still held; if void, the bond remains as it originally was. The doctrine that the release of one surety releases all does not apply in this State to sureties on official bonds. Hoskins and Millsaps have not been released in the manner pointed out by the statute, Code 1871, § 316, and therefore have not been released at all. If either defendant was liable, the court erred in excluding the evidence. Nor was this affected by the defendants' evidence. The court could not say that their witnesses were credible.

*J. F. Sessions*, for the defendants in error, Millsaps and Hoskins.

1. The sureties on a sheriff's bond are not liable for his defalcation as tax collector. Although it was held in *French v. State*, 52 Miss. 759, that a sheriff is *ex officio* tax collector, yet a separate office is attached. *Byrne v. State*, 50 Miss. 688. A bond given by the sheriff as tax collector, in the absence of any statute requiring it, will be upheld. *Harris v. State*,

55 Miss. 50. Even if this bond had contained the condition to perform all duties incident to the office of sheriff, which it does not, still the suit could not be maintained for default in the special duties of tax collector. *State v. Mayes*, 54 Miss. 417; Code 1871, § 309. The remedy in this case, under the decisions cited, was plainly on the tax collector's bond, and there cannot be a remedy on both bonds.

2. No sheriff's bond existed after Moore was required by the order of the board to give a new bond and failed to comply, except by substituting Matthews for the sureties who had applied to be released. The order required by Code 1871, § 316, was made, and the erasure of two names and substitution of another not being a compliance, the statutory result was that the office became vacant. Moore was thereafter only an officer *de facto*, and the only bond was that of Matthews. At all events, the release of Burnett and Lowenthall operated as a release of their co-sureties, who had no notice of the proceeding. *Oneale v. Long*, 4 Cranch, 60; *Speake v. United States*, 9 Cranch, 28; 1 Parsons on Contracts, 27. The risk cannot be thus increased without the surety's consent. *Lipscomb v. Postell*, 38 Miss. 476.

*W. P. Harris*, for the defendant in error, Matthews.

1. The sureties were, by force of the statute, relieved from further liability, when the board of supervisors, under Code 1871, § 316, required a new bond. It was not their duty to see that the board took such bond; nor were they responsible for the means used to protect the public. The relief given by the statute does not depend on the validity of the new bond. The sureties on the old bond remain liable for all defaults up to the time of the action of the board, but not beyond. Whatever may be said of the legislative power to pass a law by which one or more of the sureties on official bonds are discharged, leaving the others bound, the legislature has not made such an unreasonable law. The law does not contemplate additional sureties. *Lewenthall v. State*, 51 Miss. 645; *State v. Hull*, 53 Miss. 626. In California, under a statute like ours, the court held that a discharge of one surety operates to discharge all, and distinguished those statutes which give authority to demand additional or cumulative

security from those which authorize the sureties to obtain a discharge. *People v. Buster*, 11 Cal. 215.

2. It is neither alleged nor proved that the other sureties assented to the discharge of the two. Matthews never contemplated becoming sole surety, but signed, thinking the others were bound; and if the board failed to take the proper steps to bind them, he is not bound. On the contrary, if we assume that Burnett and Lowenthal were not released, then there was no substitution of Matthews for them. It is not pretended that additional security was aimed at. If there was no release, there was no consideration for Matthews's signing. The case of Matthews is within the principle that a signing by one, on the consideration that others are to be bound with him, is void unless they are bound.

3. But if the court should hold that Matthews was grafted upon the old bond, there is the further defence that the suit should have been on the tax collector's bond. *French v. State*, 52 Miss. 767; *Harris v. State*, 55 Miss. 50. Parties signing the sheriff's bond must be understood to intend becoming liable on the bond, by reason of Code 1871, § 219, only. The legislative omission to require a tax-collector's bond cannot justify the court in giving the sheriff's bond a scope clearly not contemplated. The amount fixed by § 219 shows that the legislature never designed that bond to cover taxes. The section contemplates a sheriff's bond *eo nomine*, and so the sureties understood.

CAMPBELL, J., delivered the opinion of the court.

Under the Code of 1871, the sheriff was *ex officio* tax collector within his county. He was required by § 219 to execute a bond, conditioned as prescribed, and he was not required to execute a bond for the performance of his duties as tax collector. *French v. State*, 52 Miss. 759. It follows that the bond given by a sheriff was a security for the faithful discharge of all the duties pertaining to such office. Although this may not have been the understanding of the obligors, it was the legal scope of the bond required of sheriffs. As the sheriff's bond was a security for his duties as tax collector, it did not cease to be such by the execution by the sheriff of other bonds,

conditioned specifically for his performance of duty as tax collector. They did not narrow the scope of the first-mentioned bond.

In *Harris v. State*, 55 Miss. 50, we sustained an action on a bond executed by a sheriff as tax collector, on the ground that § 1376 of the Code of 1871 authorized the board of supervisors to require a bond of the collector for the collection of any special tax levied by it for county purposes; and as it might be true that the board had failed to exercise its right to require such bond because of the giving of the tax collector's bond sued on, under which the taxes levied by the board of supervisors had been collected, it was proper to regard the bond as having sufficient consideration to uphold it, as a security for county taxes. It was not decided in that case that the Code required of the sheriff any other bond than that prescribed by § 219. It is true, as stated in the opinion in that case, that there is abundant evidence in the Code of the legislative assumption of the fact that there was a tax collector's bond, but there is no requirement by the Code that a tax collector's bond should be given, except in the state of case provided for by § 1376.

Sect. 316 of the Code provides for the discharge of sureties on an official bond from further liability on their bond, as to the performance of all official duties, after the giving of such new bond as is therein provided for, which is "a new bond with other good and sufficient sureties, in a penalty not less than the first bond, and conditioned according to law." It is plain that a new bond, in a penalty not less than the first bond, is contemplated by this section. The obligors continue bound until their release according to law. The board of supervisors could not discharge a surety upon any other terms than those prescribed by law. Under the above-cited section, it was the approval of the new bond required, which discharged sureties from their liability on the former bond as to the future. The former bond was to be the security for the past, and the new bond for the future. That law did not contemplate substituted sureties to take the place of sureties discharged. It made no provision for releasing sureties by erasing their names, and substituting other

names in their stead. The act of the board of supervisors in directing the clerk to erase the names of two of the sureties on the bond, and in accepting the name of Matthews, who offered himself as "additional security" for the sum of \$4,000, as a substitute for the two sureties whose names were erased, was unauthorized and illegal, and did not have the effect to discharge Burnett and Lowenthal, and did not affect the liability of any of the obligors. All the obligors remained bound as before; and the act of Matthews in executing the bond did not make him a co-obligor in the bond, and liable as such, because it was not done in accordance with law. Burnett and Lowenthal supposed they were discharged from the bond, but they were not. They should have seen to it that a new bond was given, as this alone would discharge them. *Stevens v. Allen*, 19 Ohio St. 485.

It follows from these views that Matthews was not bound to the State on this bond, and that his demurrer to the declaration should have been sustained; and that Millsaps and Hoskins were not discharged by the illegal blundering of the board of supervisors in undertaking to accept a substitute for two of the sureties and to discharge them. As no recovery can be had in this action against Matthews, we assume that it will be dismissed as to him, and will not notice his pleas and the action of the court on the demurrers to them. The demurrers should have been sustained to the first, second, third, fourth, and sixth pleas of Millsaps and Hoskins. It was improper to exclude all the evidence from the jury. It certainly tended to show the right of the plaintiff to recover of Millsaps and Hoskins.

*Judgment reversed and cause remanded.*

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W. J. HUBBARD ET AL. v. WILLIAM RUTLEDGE.

1. JURORS. *Competency. Challenge. Curing error.*

The defendant's clerk is an incompetent juror; and his peremptory challenge will not cure the erroneous overruling of objection to him, if the plaintiff's challenges are exhausted before the panel is completed.

2. **LIBEL.** *Privileged communication. Relevancy of evidence.*

In a suit by one merchant against another for libel, in writing that the plaintiff burned his store for the insurance money, if the defence is the honest motive, the defendant, who has denied malice, may be cross-examined as to the effect of the plaintiff's business on his.

3. **SAME.** *Occasion. Information and advice. Justification. Belief.*

In such case, the plaintiff is entitled to recover if the defendant wrote to injure him in business; *aliter*, if, believing on good ground the statement to be true, he wrote in good faith to protect the insurance company.

ERROR to the Circuit Court of Covington County.

Hon. A. G. MAYERS, Judge, having been of counsel, C. C. MILLER acted as judge *pro hac vice*.

This action was brought by W. J. Hubbard and Thomas I. Hubbard, partners under the name of W. J. Hubbard & Bro., against the defendant for a libel, in writing a letter to the Merchants' Insurance Company of New Orleans, to the following effect: The establishment of Hubbard & Bro. at Jaynesville was burned a few days ago, and I hear that they had it insured in your company for three thousand dollars. It is well understood in the neighborhood, and I am confident proof can be made to the effect, that the place was burned by the parties themselves in order to get the insurance money. I heard several men say that they did not think there was more than five hundred dollars worth of goods in the house a few days before it was burned, and it is believed that nearly all the goods were moved before it was fired. I don't think you ought to pay the policy without testing the case, as it is giving rogues too good a chance, and at the same time is prejudicial to persons doing a legitimate business. If such things are allowed, the premiums will be so high in the county that an honest man cannot insure.

The defendant pleaded the general issue, with notice that he would offer evidence to prove that a report, which he had reason to believe, was current in the plaintiffs' neighborhood, that they had burned their store-house; that the insurance company, like himself, was interested in having the rumor investigated; and that the letter was a confidential communication, made with a view to such inquiry, and not in malice.

In impanelling the jury, L. Berry stated on his *voir dire* that he was then, and had been for some time, in the employ of the defendant as clerk; that he had carried a letter in regard to this suit from the defendant to his counsel, and had frequently heard the case talked about, but had formed no opinion, and could impartially try it. The plaintiffs objected to the juror, and on the overruling of their objection excepted. They then challenged Berry peremptorily, and afterwards exhausted their peremptory challenges before the completion of the panel.

The plaintiffs introduced the letter in evidence, and proved that when one of them went to New Orleans for the insurance money, it was shown to him, and that the refusal of the company to pay caused a rigid examination to be made by its agent, who reported the accusation unfounded, and that thereupon the loss was discharged. The defendant, having proved the existence of the rumor by several witnesses, and testified, under the plaintiffs' objection, to recitals thereof to him by different persons before he wrote, proceeded to state that, although the plaintiffs had ordered him out of their store, where he went to examine their stock, he had no malice, but made the communication that the matter might be investigated. The plaintiffs objected to this evidence, but the objection was overruled. The defendant was then asked by the plaintiffs' counsel if the plaintiffs were not, prior to the letter, taking a good part of the trade he was receiving before they began business. The defendant's counsel objected to the question, and the objection was sustained.

The court charged the jury for the plaintiffs, that the language of the communication, if virulent and abusive, and stronger than the occasion justified, was a circumstance from which malice might be inferred; that the jury were to judge from the letter, and all the other evidence in the case, whether the defendant wrote and published it with lawful or malicious intentions; that if he did it maliciously to injure the plaintiffs, it was unnecessary for them to prove actual or special damage, — the law presuming damage without proof, and the jury might assess exemplary damages; that malice meant ill-will, and the jury were to take the defendant's disclaimer in connection with all the other facts.

For the defendant, the court instructed the jury that the plaintiffs were not on trial for burning their store-house, but that the issue was whether there was a rumor to that effect in their neighborhood, which Rutledge had reason to credit; that it mattered not whether they were guilty, if such was the bruit, and the defendant believing the fact, wrote the letter in good faith and without malice; that every one who believes himself possessed of knowledge, which, if true, may affect another's interests, has the right to disclose his conviction with or without any previous request, and whether he has or has not personally any interest in the subject-matter; that if A. believes that B. is intending to rob C., he has the right to communicate his belief to the latter without waiting for him to inquire on the subject; and B., if injured by such act, is without redress.

The jury found for the defendant; and the plaintiffs, after motion for a new trial, which was overruled, brought up the case.

*J. L. McCaskill*, for the plaintiffs in error.

1. It is the court's duty to see that a fair and impartial jury is impanelled. A juror should be entirely exempt from every influence likely to produce the least bias towards either party, and should have no motive to find a verdict for one or the other save a sense of duty and justice. *Ferriday v. Selser*, 4 How. 506; *Childress v. Ford*, 10 S. & M. 25; *McGuire v. State*, 37 Miss. 369; *Powers v. Presgroves*, 38 Miss. 227; *Gilliam v. Brown*, 43 Miss. 641. In this case, the plaintiffs, having exhausted their peremptory challenges, were forced to take such jurors as were tendered them, which brings the case within the rule of *Ferriday v. Selser*, *ubi supra*.

2. The court erred in its action on the objections to evidence. Rutledge should not have been allowed to state that he wrote the letter without malice, because that was a matter to be proved by his conduct; and, as the plaintiffs could only prove his motive by his acts, the defendant should have been restricted to the same kind of evidence. Clearly Rutledge should have been compelled to answer the question as to what effect the plaintiffs' business was having on his.

3. Respecting the instructions, the court also erred. When a man goes beyond what is necessary to communicate in-



formation, and indulges in defamatory language not warranted by the facts, the communication becomes slanderous and ceases to be privileged. Cooley on Torts, 205, 215; *Sands v. Robison*, 12 S. & M. 704; Addison on Torts, 955, 971; Townshend on Slander and Libel, § 209; Starkie on Slander and Libel, 829, 339. The case is like that of the defendant, who, pretending to investigate a charge of bigamy against the plaintiff, advertised a reward for information of his marriage prior to nine o'clock on a certain day, where the court held that the advertisement exceeded the requirements of the occasion, and was a libel.

*A. J. McLaurin*, on the same side.

*R. H. Thompson*, for the defendant in error.

1. The juror Berry was not incompetent. He was a clerk of the defendant. But that fact alone is too indefinite to determine that the juror would have been biassed in the defendant's favor. The presumption is that, in hearing the case talked about, he heard mere rumors. The plaintiffs who objected should have definitely shown his bias. *State v. Flower*, Walker, 318; *State v. Johnson*, Walker, 392; *Noe v. State*, 4 How. 330; *King v. State*, 5 How. 730; *Alfred v. State*, 37 Miss. 296; *Ogle v. State*, 33 Miss. 383; *Nelms v. State*, 13 S. & M. 500. The juror had formed no opinion, and could try the case. Again he was not impanelled. If a fair and impartial jury was obtained, what does it signify that the plaintiffs' peremptory challenges were exhausted? It is not shown that any juror was impanelled whom the plaintiffs would otherwise have challenged.

2. The court was right in its action on the evidence. The defence being that the letter was a confidential communication, the question was, Did the defendant believe the communication? The gist of the action, to which he pleaded not guilty, was malice, and it was proper for the defendant to state that he wrote without malice. Townshend on Slander and Libel, § 241. Rutledge's business had nothing to do with the case; the question about the Hubbards taking away his business was irrelevant.

3. There was no error in the instructions. A lawful occasion, in the absence of actual malice, supplies a sufficient justi-

fication. Thus where a clergyman, in his sermon, recited a case out of Fox's Martyrology, that one Greenwood being a perjured person and a great persecutor had plagues inflicted on him, and was killed by the hand of God, Greenwood who had not been so plagued, but was present at that sermon, sued the preacher for calling him a perjured person, and the jury found for the defendant on the ground that he delivered the matter as a story, and not with intent to slander. Cro. J. 91. And the plaintiff who sued one for saying of him that "he heard he was hanged for stealing of an horse" was nonsuited, upon it appearing in evidence that the words were spoken in grief and sorrow for the news. Lev. 82; 1 Vin. Abr. 540; Townshend on Slander and Libel, § 241; Starkie on Slander and Libel, 217, 321; *Bradley v. Heath*, 12 Pick. 163.

CAMPBELL, J., delivered the opinion of the court.

The juror, Berry, was not above all exception as a juror, and should have been rejected by the court. He was in the service of the defendant as a clerk, and that made him incompetent. It is true he was peremptorily challenged by the plaintiffs, but this required one of their peremptory challenges, which were exhausted, as the record shows, before the panel was completed. 3 Black. Com. 363; 2 Graham & Waterman on New Trials, 245, *et seq.*

The action of the Circuit Court on various questions of evidence was correct, except in its refusal to permit the defendant to be fully examined by counsel for the plaintiffs as to the effect of the business of the plaintiffs, as merchants, on his business. The fullest cross-examination, calculated to elicit a statement of the true state of feeling on the part of defendant towards the plaintiffs as rivals in business, should have been allowed. The defendant had testified for himself, and had asserted that he was not actuated by malice in writing the letter which was the alleged libel for which the action was brought. He had stated that he was a merchant, and that he had been ordered out of the store of the plaintiffs a short time before the writing of the letter spoken of above, and that he had no ill-feeling towards the plaintiffs. It was the right of the plaintiffs to interrogate him as to the rival business of

the plaintiffs in competition with his, and how theirs had affected his, with a view to weaken or overthrow his statement as to the impulse under which he wrote the letter complained of. The vital point in the case is the feeling which prompted the writing of the letter. The defence is, that the defendant acted under an honestly entertained belief of the truth of what he wrote, and with the innocent purpose to advise the insurance company for its advantage and in the interest of honesty and fair dealing. This is the only defence which can shield him from the just consequences of the letter. The jury are to determine the sincerity of this defence, and no obstacle should be thrown in the way of the effort to test it by ascertaining the relations between the defendant and the plaintiffs, when the letter was written, with a view to discover the motive actuating the writer, so as to determine the truth of his declaration as a witness, that he was not moved by malice to write the letter.

We find no fault with the instructions. The law was propounded by the instructions given with substantial accuracy. The principles of law, applicable to the facts of this case, are plain and simple. There is but a single controverted question in the case; viz. the motive of the defendant in writing the letter, and the grounds he had for making the statements in it. He wrote it, and it is libellous, and damages should be awarded, according to the judgment of the jury, unless it should appear that the defendant acted honestly, and from good motives in writing it. If the occasion was used by the defendant to defame the plaintiffs, or to injure them by inducing the withholding of the money due them on the policy of insurance, because he disliked them, or from any other evil motive, he should be found guilty. On the other hand, if the defendant had learned that it was well understood in the neighborhood that the plaintiffs had burned their store, and he believed this to be true on reasonable grounds, and that the charge could be established by evidence; and acting under this belief, and from a desire, honestly entertained, to shield the insurance company from the unjust demand of the plaintiffs, or in the general interest of justice and fairness, and not from any evil motive, he wrote and sent the letter, he should be

found not guilty. It was the right of the defendant to communicate the information he had to the insurance company, if his sole purpose was to do good by preventing the consummation of wrong and injustice; but if he had no such information, or was not warranted in believing the truth of what he wrote; or made haste to communicate a false charge, where it might do harm, for the purpose of doing injury, in some way, to a rival in business, or from any unworthy motive, his conduct deserves, and should receive condemnation and punishment. It was the right of the defendant to show what he had heard and believed as to the fire, and what induced him to write the letter, with a view to vindicate his act as one of which the plaintiffs had no right to complain. It was the right of the plaintiffs to meet this defence, and overthrow it, if they could, by any pertinent evidence.

We make no comment on the evidence, but because of the action of the court in holding Berry to be competent as a juror in this case, and in denying to the plaintiffs the right to examine the defendant as to the effect of the business of the plaintiffs on his business, we reverse the judgment, grant a new trial, and remand the case. *So ordered.*

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JONES S. HAMILTON, LESSEE, ETC. v. THOMAS FLOWERS.

1. HABEAS CORPUS. *Convict. Escape.*

If a convict, who sues out a writ of *habeas corpus* to obtain his release from the penitentiary, escapes before the hearing thereof, the proceeding should be dismissed. *Ex parte Walker*, 53 Miss. 866, cited.

2. SAME. *Subpœna for witness. How issued.*

A subpœna for a witness issued in such a case without the Chancellor's order is sufficient to support a fine for non-attendance, if sent out by the circuit clerk from whom, under the Chancellor's fiat, the writ of *habeas corpus* emanates, and at the court-house of whose county it is returnable.

3. SAME. *Defaulting witness. Fine.*

But no fine should be imposed for such relator's benefit; and if judg-

ment for non-attendance be entered against the witness, the proceeding will not be retained to enable the relator to collect it.

4. SAME. *Practice. False return. Continuance.*

Practice in *habeas corpus* cases, where there is reason to doubt the return, discussed, with rules as to continuances.

APPEAL from the decision of Hon. THOMAS Y. BERRY, Chancellor of the Tenth District of Mississippi.

*Nugent & Mc Willie*, for the appellant.

1. If an escaped convict can maintain a writ of *habeas corpus* against the lessee of the penitentiary who has lost him, this proceeding should be sustained, otherwise not. Much righteous indignation seems to have been expended by the Chancellor, who fined everybody, and held every one in contempt. Flowers was doubtless all the while blooming in Texas. The proceeding should have been dismissed when the escape was established. At all events, it should not have been longer maintained when the relator could not be caught.

2. The subpoena for Hamilton was improperly issued without the order of the Chancellor, when there was no writ of *habeas corpus* legally pending, and it was therefore wrong to award judgment against the witness for his failure to obey it. Code 1871, § 1411. The judgment, which is in the nature of a fine for the relator's benefit, should not be retained, but must fall in the dismissal of the *habeas corpus* proceeding. The relator who was not present at the return of the writ, should be held to have released his claim against the defaulting witness. Possibly the lessee was too intent upon his search to be diverted by a useless summons; and no law charges him with the escaped convict's travelling expenses.

*T. A. Mc Willie*, on the same side, argued the case orally.

*Cassedy & Stockdale*, for the appellee.

No brief for the appellee is found in this case.

*T. B. Stockdale*, on the same side, made an oral argument.

GEORGE, C. J., delivered the opinion of the court.

The appellee sued out a writ of *habeas corpus* returnable before Chancellor Berry, with the view, as shown by his peti-

tion, of getting a release from the State Penitentiary, to which he had been sentenced. The ground on which he sought the release was, that the judgment of conviction had been superseded under proceedings for a writ of error. The appellant, in his return to the writ, stated his inability to produce the body of the relator, because he had escaped. It is not clear from the record, but it seems the most probable meaning of it, that the relator, through his counsel, took issue on the return, and the court heard evidence on the issue. The record also fails to show clearly how the court determined the issue; but we infer from the fact that the court allowed, in its final judgment, the appellant sixty days in which to produce the relator, that the court was of the opinion that there had been an escape, and that time was allowed for a recapture. The Chancellor in the absence of the relator, and with the above implications as to his escape, proceeded to render final judgment; adjudging, that the confinement of the relator in the penitentiary was illegal, and directing that the appellant should, within sixty days, return the relator to the sheriff of Pike County, in which county he had been convicted; and, on failure to do so, that he should show cause for such failure.

The judgment was unauthorized. If the Chancellor, on hearing the evidence in relation to the escape, was satisfied that the return was false, he should have punished the appellant for a failure to obey the writ, continued the trial to another day, and ordered the production of the relator at the time named. If he was in doubt as to the escape, he should have continued the trial of that issue until satisfactory evidence could be procured, and directed also a production of the body of the relator at the time indicated; and, if an escape was again urged as an excuse for a non-production of the body of the relator, the validity of the excuse should have been fully investigated. The Chancellor had full power and authority to make all orders necessary to try the question of the alleged escape; and, in case he found there was no escape, then to punish the defendant in the *habeas corpus* proceeding for his failure to obey the writ and to provide for the production of the body of the relator. But whenever it appeared that there had been an escape, and that it was not in the power of the defendant

to produce the body of the relator, the proceedings should have been dismissed; for the Chancellor had no jurisdiction to inquire into the legality of the detention or conviction of the relator in his absence. *Ex parte Walker*, 53 Miss. 366.

It is also assigned for error that the Chancellor entered a fine against the appellant for his failure to attend as a witness on the day on which the writ of *habeas corpus* was returnable. This fine was, in pursuance of the statute, entered up as a judgment in favor of the relator. We do not think the objection urged by the appellant, a good one; which is, that he was not bound to obey the subpoena, because it did not appear to have been issued in pursuance of a previous order of the Chancellor. The subpoena was issued by the circuit clerk at the court-house of whose county the writ was made returnable; and the writ of *habeas corpus* was also issued by the clerk under the fiat of the Chancellor. Under these circumstances, we think that the clerk was authorized to issue subpoenas for witnesses, as in other cases pending in his court. But we do not regard the fine imposed as within the rules which govern ordinary fines imposed by courts as punishments for contempts against their authority and dignity. The statute directs the imposition of fines against defaulting witnesses summoned for the relator, in the shape of judgments in his favor. A proceeding of that character we regard rather as a means of assessing damages to the relator for his failure to get the evidence of a defaulting witness, than as an exertion of power by the Chancellor to protect his authority and to enforce obedience to lawful process. The fine imposed is the private property of the relator, who may remit it if he sees proper. Regarding it in this light, we must consider the right of the relator to the money, as well as the default of the witness. As the prisoner had escaped, and was not present by his own free will, and as it was impossible for him to avail himself, while absent, of the witness's evidence, we cannot see how he has been damnified by the failure of the witness to attend, or how he can demand the punishment for a default which worked no possible injury to him. The relator having sued out a writ of *habeas corpus* when he had escaped, or having escaped afterwards, so that he could not be produced,

whereby the proceedings must necessarily come to an end without a trial on the merits, we cannot see the propriety of allowing them to be continued for the sole purpose of securing to him a pecuniary benefit which he does not deserve. He must be treated as having released the witness from his obligation to attend and testify.

*Both judgments reversed and proceedings dismissed.*

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H. W. HARDY v. J. S. PILCHER.

1. **BILL OF EXCHANGE.** *Acceptance. Principal and agent. Evidence.*  
Parol evidence is admissible, between the parties, to show that the intent of an acceptance of a domestic bill drawn by H. and accepted by B., "agent of H.," was to charge, not B. personally, but H., whose funds B. held.
2. **SAME.** *Demand and notice. Promissory note.*  
Such accepted bill is in effect the note of the drawer, whose liability is not terminated by lack of presentment to the acceptor, or of notice of non-payment.

ERROR to the Circuit Court of Winston County.

Hon. JAMES M. ARNOLD, Judge.

The defendant in error sued H. W. Hardy on two bills of exchange, drawn by the latter in the following terms:—

"LOUISVILLE, MISS., July 17, 1874.

"DEAR SIR,— On the 1st day of December next, please pay to J. S. Pilcher or bearer, the sum of four hundred dollars, and charge the same to my account.

"(Signed)

H. W. HARDY.

"To Wm. S. Bolling."

Across the face of each was written,

"Accepted, Wm. S. Bolling, agent of H. W. Hardy."

Pilcher had judgment, notwithstanding the defence that the bills were never presented for payment to Bolling, but, long after maturity and without previous notice of non-payment, were presented to Hardy.



*Rives & Rives*, for the plaintiff in error.

1. Parol evidence was inadmissible to charge Hardy as the principal or acceptor of the bills sued on. 1 Daniel on Neg. Inst. § 303. The suffix to Bolling's acceptance "Agent of H. W. Hardy" was *descriptio personæ*. 1 Daniel on Neg. Inst. § 305. But one party can be legally liable as acceptor. Story on Bills of Exchange, § 254. Hardy's only liability was that of drawer.

2. The drawer who has placed securities in the drawee's hands, out of which to pay the draft, is entitled to notice of non-payment. 2 Daniel on Neg. Inst. §§ 1075, 1077, 1079. Equivalent circumstances or agreements will not be deemed a waiver of due presentment. Story on Bills of Exchange, § 371. The waiver must be unequivocal. 2 Daniel on Neg. Inst. § 1173.

*Price & Miller*, for the defendant in error.

1. The acceptance was not Bolling's, but Hardy's by him as agent. *Rockwell v. Elkhorn Bank*, 13 Wis. 653; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; *Clafin v. Farmers' Bank*, 36 Barb. 540; *Houghton v. First National Bank*, 26 Wis. 663; *Lafayette Bank v. State Bank*, 4 McLean, 208; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Burnham v. Webster*, 19 Maine, 282; *State Bank v. Wheeler*, 21 Ind. 90; *State Bank v. Fox*, 3 Blatch. 431; *Bank of New York v. Bank of Ohio*, 29 N. Y. 619; *Baldwin v. Bank of Newbury*, 1 Wall. 234; *Robb v. Ross County Bank*, 41 Barb. 586. While the negotiable instrument is in the hands of the original parties, it is not a variation of the written contract to show by parol the nature of the acceptance. Story on Bills of Exchange, § 77, and note; 1 Daniel on Neg. Inst. §§ 302, 303, 311, 418, 419, 486; *Richmond Railroad Co. v. Snead*, 19 Gratt. 354; *Mott v. Hicks*, 1 Cowen, 513; *Hicks v. Hinde*, 9 Barb. 528; *Babcock v. Beman*, 1 Kern. 200; *Lerned v. Johns*, 9 Allen, 419; *Kenworthy v. Schofield*, 2 B. & C. 945; 1 Parsons on Notes and Bills, 96; *Higgins v. Senior*, 8 M. & W. 834; *Krumbhaar v. Ludeling*, 3 Martin, 640; Chitty on Bills, 34; *Ford v. Williams*, 21 How. 287; *Curry v. Reynolds*, 44 Ala. 349; *Baldwin v. Bank of Newbury*, 1 Wall. 234; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326.

2. When a principal draws a draft on his agent for his

acceptance as agent, the acceptance being made in that shape by direction of the principal, to be paid out of a particular fund which is fully accounted for subsequently by the agent to the principal, the legal effect of the instrument is to bind the principal primarily, as on his promissory note. *Roach v. Ostler*, 1 Man. & R. 120; *Cunningham v. Wardwell*, 12 Maine, 466; *Hasey v. Beet Sugar Co.*, 1 Doug. (Mich.) 193; *Van Reimsdyk v. Kane*, 1 Gallis. 630; *Banorjee v. Hovey*, 5 Mass. 11; *Mayhew v. Prince*, 11 Mass. 54; *Dougal v. Cowles*, 5 Day, 511; Chitty on Bills, 28, 392.

*Nugent & McWillie*, on the same side.

1. The effect of the evidence was to show what was meant by the words added to the signature W. S. Bolling; whether they were merely intended as a description of the person, and, therefore, surplusage; or whether they were to figure in the case as something of importance. In this point of view *Verzan v. McGregor*, 23 Cal. 339, and *Ohio Railroad Co. v. Middleton*, 20 Ill. 629, are controlling. So are *Baldwin v. Winslow*, 2 Minn. 213; *Donnelly v. Simonton*, 13 Minn. 301; *Farmers' Bank v. Whinfield*, 24 Wend. 419; *Poindexter v. McCannon*, 1 Dev. Eq. 373; *Lowry v. Adams*, 22 Vt. 160; *Gray v. Harper*, 1 Story, 574; *Noble v. Epperly*, 6 Ind. 468; *Cousins v. Westcott*, 15 Iowa, 253; *Baldwin v. Bank of Newbury*, 1 Wall. 234; *Scammon v. Adams*, 11 Ill. 575; *Harris v. Pierce*, 6 Ind. 162; *Emmons v. Overton*, 18 B. Mon. 643; *Farmers' Bank v. Day*, 13 Vt. 36; *Pollard v. Stanton*, 5 Ala. 451; *Bank of St. Marys v. Mumford*, 6 Ga. 44; *Ward v. Stout*, 32 Ill. 399; *Grafton Bank v. Kent*, 4 N. H. 221; *Adams v. Flanagan*, 36 Vt. 400; *Riley v. Gregg*, 16 Wis. 666. Parol evidence is admissible to prove that the true character of the acceptor's contract differs from that which the law would imply. *Bank of Mobile v. Coleman*, 20 Ala. 140; *Watkins v. Kirkpatrick*, 2 Dutch. 84; *Hunt v. Chambliss*, 7 S. & M. 532; *Bell v. Shibley*, 33 Barb. 610.

2. It was understood that the bills would be paid out of funds thereafter to be collected by Bolling as the agent of Hardy, and the case was really one in which the drawer and acceptor were identical. There was no reason, therefore, for protest. In effect the bills could only operate as an equitable

assignment of funds which might come into the attorney's hands thereafter. *Ross v. Bedell*, 5 Duer, 462; *Barbaroux v. Waters*, 3 Met. (Ky.) 304; Story on Bills of Exchange, § 239. Hardy should not be allowed to repudiate the transaction. *Patten v. Newell*, 30 Ga. 271; *Pack v. Thomas*, 13 S. & M. 11; *Commercial Bank v. Hughes*, 17 Wend. 94; *Flemming v. Denny*, 2 Phil. (Pa.) 111.

CHALMERS, J., delivered the opinion of the court.

The drawer of the bills of exchange sued on resisted payment upon the ground that there had been no presentment for payment, to the acceptor, and no notice of non-payment given to himself. Parol proof was admitted, against the objection of the drawer, which fully established the fact that the paper, though in form a bill of exchange, should be treated as between the parties as a promissory note. Hardy, the drawer, being indebted to Pilcher, and having unrealized assets in the hands of his attorney, Bolling, the parties met to secure the indebtedness. Pilcher wrote the drafts or domestic bills sued on, and handed them to Hardy, who signed them. They were then handed to the attorney, Bolling, for acceptance. He declined to bind himself personally in any manner, but was willing, if desired, to accept as agent of Hardy and as binding the latter only. This being assented to, he wrote across the face of the bills, "Accepted, Wm. S. Bolling, agent of H. W. Hardy." It is evident that, according to the true intent of the parties as thus disclosed, the bills were substantially the promissory notes of Hardy, and that the shape which the transaction took was intended only as a dedication *pro tanto* of the assets in the hands of Bolling, and for the better satisfaction and security of Pilcher. If, therefore, the testimony was admissible, the court below rightly instructed the jury that the drawer was liable, though there had been no presentment and notice.

Ordinarily, no extrinsic testimony of any kind is admissible to vary or explain negotiable instruments. Such paper speaks its own language, and the meaning which the law affixes to it cannot be changed by any evidence *aliunde*. One of the few exceptions to this rule is, where any thing on the face

of the paper suggests a doubt as to the party bound, or the character in which any of the signers has acted in affixing his name, in which case testimony may be admitted between the original parties to show the true intent. Thus, where one has signed as agent of another, while the *prima facie* presumption is that the words are merely *descriptio personæ*, and that the signer is individually bound, yet it may be shown, in a suit between the parties, that it was not so intended, but that, on the contrary, the true intention was that the payee should look to the principal, whose name was disclosed in the signature of his agent, or who was well known to be the true party to be bound. 1 Daniel on Neg. Inst. § 418; *Haile v. Peirce*, 32 Md. 327; *McClellan v. Reynolds*, 49 Mo. 312; *Baldwin v. Bank of Newbury*, 1 Wall. 234; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; s. p. 1 Am. Lead. Cas. 633. The principle, though not recognized in all the cases, is, we think, a sound one, and supported by the weight of authority. It is decisive of the case at bar. *Judgment affirmed.*

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W. McD. MEGGETT, USE, ETC. v. J. F. BAUM.

1. BILL OF EXCHANGE. *Failure to indorse. Suit in payee's name.*  
A purchaser for value, without indorsement, of a bill of exchange, payable to order, can sue thereon in the name of the payee.
2. SAME. *Accommodation acceptor's liability.*  
The acceptor in such case is liable, although his acceptance was merely for the accommodation of the drawer.
3. SAME. *Release of acceptor. Forbearance. Extrinsic evidence.*  
But he can prove that, being a surety, he is released by a contract of forbearance to the drawer, made by the purchaser with knowledge of the fact.

ERROR to the Circuit Court of Warren County.

Hon. UPTON M. YOUNG, Judge.

Assumpsit in the name of W. McD. Meggett, for the use of James Murray, against J. F. Baum, on his acceptance of the following bill of exchange:

57	22
76	409
57	22
193	183

“\$500.

VICKSBURG, Dec. 11, 1876.

“Twenty days after date, pay to the order of myself, five hundred dollars, value received, and charge the same to account of

“W. McD. MEGGETT.

“To J. F. BAUM, Esq.,

“Vicksburg, Miss.”

Baum pleaded that he accepted, without consideration, for Meggett's accommodation, and also that he was released by an agreement, made after maturity of the bill between Murray and Meggett, to give the latter, for value received, a year's extension, during which time he became insolvent. Demurrers to the pleas were overruled; and, the instructions supporting the pleas, the verdict and judgment were for the defendant.

*L. W. Magruder*, for the plaintiff in error.

1. The acceptance sued on became vitalized by the sale to Murray. *Hall v. Wilson*, 16 Barb. 548; *Hall v. Earnest*, 36 Barb. 585; *Marvin v. M' Cullum*, 20 Johns. 288. The equitable assignee must sue in the name of the legal holder, but that is no reason why his rights should be abridged. *Gibson v. Cooke*, 20 Pick. 15. The rights of an assignee of undorsed paper cannot be restricted to a narrower limit than that of a purchaser of dishonored paper, or than that imposed by our statute upon every assignee. 1 Parsons on Notes and Bills, 183; Red. & Big. Lead. Cas. on Bills and Notes, 216, 217; *Grant v. Ellicott*, 7 Wend. 227; *Thompson v. Shepherd*, 12 Met. 311; 1 Daniel on Neg. Inst. §§ 726, 790; *Lancaster Bank v. Taylor*, 100 Mass. 18; Byles on Bills, 2; *Kimball v. Huntington*, 10 Wend. 675; *Welch v. Mandeville*, 1 Wheat. 233; *Carpenter v. Marnell*, 3 Bos. & Pul. 40; *Wheeler v. Wheeler*, 9 Cowen, 84; *Littlefield v. Storey*, 8 Johns. 425; *Winch v. Keeley*, 1 T. R. 619. *Peters v. Soame*, 2 Vern. 428; *Parker v. Kelly*, 10 S. & M. 184.

2. Acceptors assume the character of principals by express contract; and, as to them, it is not competent to prove that they are sureties, and so released by giving time to the drawer. *Farmers' Bank v. Rathbone*, 26 Vt. 19. This is now established by the decided weight of authority, both English and American. Story on Promissory Notes, § 418. Other Amer-

ican cases approving the doctrine are: *Bank of Montgomery County v. Walker*, 9 S. & R. 229; s. c. 12 S. & R. 382; *White v. Hopkins*, 3 W. & S. 99; *Lewis v. Hanchman*, 2 Barr, 416; *Murray v. Judah*, 6 Cowen, 484; *Clopper v. Union Bank*, 7 Har. & J. 92; *Yates v. Donaldson*, 5 Md. 389; *Lambert v. Sandford*, 2 Blackf. 137; *Hansbrough v. Gray*, 3 Gratt. 356; *Cronise v. Kellogg*, 20 Ill. 11; *Diversy v. Moor*, 22 Ill. 330. All these cases are authority for the position that, even if the holder knew at the time he received the bill that it was accepted for accommodation, his rights and duties are in no respect altered, and no release of an indorser or drawer will discharge the acceptor. Equally emphatic and to the same effect is the more recent case of *Marsh v. Low*, 55 Ind. 271. See also 2 Daniel on Neg. Inst. § 1334; 1 Parsons on Notes and Bills, 335, note.

*H. F. Cook*, on the same side.

1. All the requisites were complied with to establish the commercial character of the paper, except Meggett's indorsement. Parties who sign commercial paper for accommodation hold themselves out to the public as offering to become bound to any one who takes the same for value. 1 Daniel on Neg. Inst. § 186. The fact that the failure to indorse the draft was accidental negatives the presumption of intention, and rebuts the implication of notice. Baum's object in accepting the paper was to give Meggett the use of his name to raise money. Byles on Bills, 155, 156. And he cannot, as against Murray, plead its accommodation character. *Harrison v. Pike*, 48 Miss. 46. The assignee has the right to use the name of the legal holder. *Hathcock v. Owen*, 44 Miss. 799; *Eckford v. Hogan*, 44 Miss. 398. The nominal plaintiff is not a party to the suit, but can testify as a witness. *Blundell v. Vaughan*, 12 S. & M. 625; *Coopwood v. Foster*, 12 S. & M. 718; *Booyer v. Hodges*, 45 Miss. 78. When one of two persons must suffer by the act of a third, he must sustain the loss who has enabled the third person to occasion it. 1 Daniel on Neg. Inst. § 752.

2. Where a party's suretyship does not appear on the paper, a holder for value without notice is not affected thereby. *Smith v. Clopton*, 48 Miss. 66. The forbearance to the prin-

cipal must be for a definite period. *Brown v. Proffit*, 58 Miss. 649. Payment of interest due is not a sufficient consideration. *Board of Police v. Covington*, 26 Miss. 470. The creditor does not release the surety by mere passiveness ; but, to discharge him, a contract must be made which precludes the creditor from suing. *Johnson v. Planters' Bank*, 4 S. & M. 165.

*M. Marshall*, for the defendant in error.

1. The usee, although the real plaintiff, asserts only such right as the nominal party has ; and the defence of want of consideration is good, as well against the former as the latter. 1 Parsons on Notes and Bills, 184.

2. Baum, being really a surety, was released by the contract of forbearance by Murray with the principal, Meggett, whereby, owing to the latter's subsequent insolvency, Baum lost his source of reimbursement. He can show by parol that he was only a surety ; and, when that is once established, the same rules govern in his case as in that of any other surety.

*Miller & Hirsh*, on the same side.

1. It is manifest that Meggett had no right of action against Baum ; and the court below therefore rightly held that Murray could not maintain an action in his name. The holder, without indorsement, of a bill payable to order, takes it subject to the equities between the original parties. 1 Daniel on Neg. Inst. §§ 664, 742 ; *Allein v. Agricultural Bank*, 3 S. & M. 48. Courts sit neither to make contracts for parties, nor to afford them relief against the consequences of their own negligence.

2. An accommodation acceptor is entitled to the benefit of the general rule, that a creditor who knowingly prejudices the surety's rights by granting time to the principal will be precluded from enforcing the contract against him. The relation of principal and surety does not depend on the form of the contract, but the surety's equity may be shown, although the contract is under seal, with nothing on its face to indicate the relation. 2 White & Tudor's Lead. Eq. Cas. 1914, 1917 ; *Smith v. Clopton*, 48 Miss. 66 ; *Brown v. Proffit*, 58 Miss. 649. The doctrine that the surety is released is supported by strong authority. *Lazarus v. Cowie*, 3 Q. B. 459 ; *Parks v. Ingram*, 2 Foster, 283 ; *Ade v. Metoyer*, 1 La. An. 254 ; *Tin-*

*son v. Francis*, 1 Camp. 19; *Brown v. Davies*, 3 T. R. 80; *Boehm v. Sterling*, 7 T. R. 423; *Hoffman v. Foster*, 43 Penn. St. 137; *Bower v. Hastings*, 36 Penn. St. 285; *Battle v. Weems*, 44 Ala. 105; *Chester v. Dorr*, 41 N. Y. 279; *Coghlin v. May*, 17 Cal. 515; *Daggett v. Whiting*, 35 Conn. 366; *Valley National Bank v. Meyers*, 17 N. B. R. 257. This court, unfettered by precedent, will sanction a doctrine in harmony with reason and equity, and the spirit of our anti-commercial statute.

CAMPBELL, J., delivered the opinion of the court.

The bill having been accepted by Baum for the accommodation of Meggett, and to enable him to raise money by negotiating it, the transfer of the bill by Meggett to Murray, for value, invested Murray with the beneficial ownership of it, and entitled him to maintain an action in the name of Meggett for his use against Baum. There is no want of consideration available to Baum; for the value paid by Murray to Meggett for the paper supports the acceptance. It was for that it was made; viz., to enable Meggett to get money. He got it; and it does not absolve Baum from his acceptance that Meggett, when he delivered the paper to Murray for its price paid, did not indorse it. The negotiation effected its object, and the rights and liabilities of parties were fixed by the transaction. Murray became entitled to look to Baum for payment, and Baum was bound to pay according to his acceptance, and would thereby be entitled to his action against Meggett.

The doctrine that the holder without indorsement of commercial paper, which requires indorsement to pass the legal title, stands in the shoes of the payee, has no application to the facts of this case. Under our statute, entitling parties to the same defences against paper in the hands of remote holders as were available against the payee, the indorsement of the bill of exchange would not have precluded any defence which is available against the bill unindorsed. In other words, indorsement would have made no difference as to the liability of the acceptor; and to permit him to avail himself of the fact that his acceptance was without consideration would be to declare that one cannot be held liable by his undertaking for



the accommodation of another. One who accepts for the accommodation of another, and thereby procures a benefit to such other, cannot refuse to meet his obligation to him who conferred such benefit because of want of consideration. Sect. 2228 of the Code does not embrace accommodation paper, which creates no obligation until some one parts with value for it, according to the purpose for which it is made, whereby it becomes operative. The negotiation of it, according to the intent of the parties, infuses life into it, and precludes the defence of want of consideration.

The question whether an accommodation acceptor of a bill of exchange will be discharged by the act of the creditor in giving time to the drawer, with knowledge of the fact that the acceptance was for accommodation, is left by the authorities in great uncertainty. It has been hitherto undecided in this State. It is the established doctrine in this State that one of several makers of a promissory note, or a writing obligatory, is not precluded by the fact that he appears on the instrument to be a principal, and primarily bound, from averring and proving that he is a surety, and entitled to be discharged by the act of the creditor in so dealing with the principal as to discharge him as a surety; and this is the constant practice in courts of law. It is in harmony with this to hold that the acceptor for the accommodation of the drawer sustains the relation of surety to him, and is entitled to all the rights of one occupying that position in any case. We can find no substantial reason for a distinction between co-makers of a promissory note, one of whom is a surety, and an accommodation acceptor. Both have assumed by their signatures a primary obligation. Both have made themselves principals. In the case of co-makers or co-obligors, one may show that while, by the form in which he bound himself, he is a principal, in truth, he is but a surety. The same reason exists for permitting an accommodation acceptor to show his suretyship for the drawer. The holder of the paper, having no knowledge except that imparted by it, may regard the parties to it as bound accordingly; but, if he has knowledge of the actual relations between the parties, he has no greater right, in the one case than in the other, to deal with the real principal in such way as to discharge the surety.

The reason on which courts hold that the act of the creditor, in making a valid contract for forbearance with the principal, discharges the surety, applies as well in favor of an accommodation acceptor as in favor of a co-maker or co-obligor. The obligation upon the creditor to do nothing knowingly to the prejudice of the right of the surety is as applicable to the one case as to the other. It is the knowledge of the creditor that the several parties sustain to each other the relation of principal and surety which makes it inequitable for him to so act towards the principal as to vary the rights of the real surety. It is, therefore, not the form of the instrument by which parties have bound themselves, but the fact that one is principal and the other surety, as between themselves, and that this is known to the creditor.

*Reversed and remanded.*

57	28
74	480

### C. W. JONES v. A. C. EDWARDS.

1. **SLANDER.** *Variance. Words used.*

In actions for slander, the exact words charged or synonymous ones must be proved. It is not sufficient that a similar idea is conveyed.

2. **SAME.** *Verdict. Jurors cannot impeach.*

Jury men who in such an action have found one cent damages for the plaintiff, will not be allowed to impeach their verdict by stating their opinion that such verdict would carry the costs.

3. **SAME.** *Damages. Absence of injury to character.*

The law implies damage from the fact of slander; and it is error to charge that it is for the jury to say from the whole testimony whether the plaintiff's character was injured.

4. **INSTRUCTIONS.** *Hypothetical statement.*

An instruction stating a hypothetical case, which the evidence tends to prove, is not obnoxious to the criticism that it assumes the existence of the facts.

**ERROR** to to the Circuit Court of Lauderdale County.

Hon. J. S. HAMM, Judge.

A. C. Edwards, who had leased land, for the year 1876, to C. W. Jones for three bales of cotton, having received only

two bales, made certain statements, in consequence of which Jones sued him for slander. The material allegations of the declaration appear in the opinion of the court. Edwards pleaded not guilty, with a notice that he would show that Jones had delivered the third bale of cotton at Young's gin house, and subsequently taking it away without his knowledge, had sold it and used the money; and, at the trial, he offered evidence tending to prove those facts.

For the defendant the court gave, among others, the following charges. "3. It is for the jury to say whether the plaintiff's character was injured by the words spoken and they are to judge of this from the whole testimony in the case." "4. If Jones delivered the cotton at Young's gin house for Edwards and told him it was there for him and then removed it without his consent, he did wrong. The removal of cotton due for rent was in 1876 an offence under the statute."

A verdict for one cent having been returned, the plaintiff, who was by the judgment charged with costs, moved for a new trial on the ground, among others, that in rendering such verdict the jury were influenced by their opinion that it carried costs, and offered to prove this by certain of the jurors. This evidence was excluded, the motion overruled and the plaintiff brought up the case.

*Hardy & Grace*, for the plaintiff in error.

1. The precise words charged in the declaration need not be proved, but their substance is sufficient. *Miller v. Miller*, 8 Johns. 74. 2. The jury were instructed by the third charge for the defendant, that unless the plaintiff's character was injured, they should find no damages, whereas speaking the words is the gravamen of the offence. 3. The fourth instruction assumed that Jones carried a bale of cotton to Young's gin house, of which there was no proof, and the jury were by it led to believe that he committed a crime, when, in fact, he did not. 4. The jurors should have been allowed to state under what erroneous opinion of the law they acted in rendering their verdict, which would not have been thereby impeached.

*John W. Fewell*, for the defendant in error.

1. The testimony excluded by the court was clearly inad-

missible under the allegations of the declaration. 2. The law was fairly and properly stated to the jury in the instructions. They have found that the plaintiff was damaged one cent, and as the circuit judge did not disturb their verdict, this court should not. 3. The jurors could not impeach their verdict, but they should have been polled, if the litigant thought that they did not mean what their verdict said.

CHALMERS, J., delivered the opinion of the court.

The slanderous words averred in the declaration were that the defendant had said, of and concerning the plaintiff, that "he (meaning the plaintiff) had stolen, or might as well have stolen, said bale of cotton," and further that "he (meaning the plaintiff) was a d——d rascal." The court properly excluded evidence under this count, that the defendant had said, that the plaintiff "was a poor scamp, that he had taken his rent cotton and carried it off and sold it without leave, and that when the grand jury met he would show him (the plaintiff) whose cotton it was." There was a fatal variance between the language averred and that offered to be proved. In this class of cases, the exact words charged, or synonymous words, must be proved. It is not sufficient that the same general idea is conveyed. Townshend on Slander and Libel, § 364, and cases cited. There was here but little, if any, similarity of ideas, and none whatever of words, nor did the plaintiff offer to amend his declaration so as to conform to the words proved, as he would have had a right to do.

The court properly refused to allow the jury to impeach their verdict by stating that they thought that a verdict of one cent would carry the costs. The fourth instruction given for the defendant is not obnoxious to the criticism that it assumes the existence of the facts stated in it, as argued by counsel. The facts are hypothetically stated. The court erred in giving the defendant's third charge. By it the jury were told that it was for them to say whether the plaintiff's character was injured by the words spoken, and that they were to judge of this from the whole testimony in the case. The meaning of this obviously is, that though the jury believed that the words had been spoken and that they were in fact false and

slandrous, they need not give any damages if, from the character of the person speaking them, or from that of the person of whom they were spoken, or from any other cause, no actual damage had been sustained, and that actual damage must be established by testimony in order to entitle the plaintiff to a verdict. This is erroneous. The law implies damage from the fact of slander, nor will the slanderer be permitted to say, either that his own reputation is so low, or that of his victim so high, that the evil words have wrought no harm. The jury must, in such cases, give damages even though they are but nominal. The amount is to be determined by them, and their award will not ordinarily be disturbed where no error of law has occurred. *Hubbard v. Rutledge*, 52 Miss. 581; *Baylis v. Lawrence*, 11 Ad. & El. 920; *Fry v. Bennett*, 5 Sandf. 54, 76.

For the error committed in granting the third charge for the defendant, the judgment is reversed and a new trial awarded.

*So ordered.*

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E. C. BELL v. H. C. MEDFORD ET AL.

57	31
88	18

1. **NEW TRIAL.** *Immaterial errors.*

A new trial will not be granted for errors on the trial in the Circuit Court where, on a record introduced in evidence by the plaintiff in error, the verdict is manifestly right.

2. **RES ADJUDICATA.** *Ejectment. Mesne profits accruing pending suit.*

The plaintiff in ejectment, under Code 1871, ch. 17, recovers mesne profits up to the day of trial; and the judgment in such a suit is a bar to a subsequent action for the mesne profits which accrued pending the suit.

3. **SAME** *Costs. Copies used in evidence.*

The legal fees for copying records and deeds necessary in evidence in such suit are taxable as costs, and, if rejected from the cost bill by the court, cannot be recovered in a subsequent action.

**ERROR** to the Circuit Court of Lee County.

Hon. J. A. GREEN, Judge.

This action was brought by the plaintiff in error, before a magistrate, against H. C. Medford and certain persons who resided out of the county. On the trial on appeal in the

Circuit Court, the plaintiff introduced the ejectment record mentioned in the opinion, from which it appeared that the defendant, Medford, had prolonged the ejectment suit two years, by his plea therein of not guilty. But Medford testified that he held part of the time as assignee in bankruptcy, and, pending the ejectment suit, delivered possession to the other defendants. The court excluded the plaintiff's evidence tending to show the character of Medford's possession, and charged the jury that the above facts constituted a defence for Medford, and that, if they believed him not liable, they should find for the defendants generally. No charge was asked or given on the question of *res adjudicata*; and the error assigned was the action of the court on the evidence and instructions.

*W. L. Clayton*, for the plaintiff in error.

1. The mesne profits claimed accrued during the pendency of the ejectment suit, and were not demanded or recovered in that case; nor could they have been embraced under the form prescribed in Code 1871, § 1547. The cost of the records and copies of deeds was properly included in the action for mesne profits. *Tyler on Ejectment*, 849.

2. The court erroneously charged that the facts that Medford held part of the time as assignee in bankruptcy, and pending the ejectment suit delivered possession to the other defendants, were a defence to this action. *Tyler on Ejectment*, 845. And because the other defendants were residents of another county, the court instructed the jury to find for the defendants generally, if they believed that Medford was not liable; which was contrary to Code 1871, § 522.

*J. A. Brown*, on the same side.

1. The question of former recovery not having been raised in the lower court, cannot be raised here for the first time. *Anderson v. Leland*, 48 Miss. 253. The ejectment suit is not a bar, if the jury did not include the mesne profits in their verdict. *McDowell v. Langdon*, 3 Gray, 513; *Waddle v. Ishe*, 12 Ala. 308; *Perkins v. Parker*, 10 Allen, 22.

2. The instructions for the defendants were plainly erroneous. *Chirac v. Reinicker*, 11 Wheat. 280; *Jackson v. Stone*, 13 Johns. 447; *West v. Hughes*, 1 Har. & J. 574; *Lamson v. Sutherland*, 13 Vt. 309. The charge as to the effect of the non-residence

of some of the defendants was wrong ; Code 1871, §§ 522, 1303, 1320 ; *Cain v. Simpson*, 53 Miss. 521 ; and in this action the plaintiff may recover the cost of records and copies of deeds used in the ejectment suit. *Goodtitle v. Tombs*, 3 Wils. 118 ; *Pearse v. Coaker*, L. R. 4 Ex. 92.

*H. C. Medford*, a defendant in error, *pro se*.

In the ejectment suit, the jury evidently gave the plaintiff all the rent he was entitled to, and the cost of the records and copies of deeds was included in the cost bill in that case by the clerk, and expunged therefrom by order of court. The instructions for the defendants were correct. *Crumpp v. Gerock*, 40 Miss. 765 ; *Co-operative Association v. Leflore*, 53 Miss. 1 ; *Nixon v. Porter*, 38 Miss. 401 ; Tyler on Ejectment, 847, 848.

*J. L. Finley*, for the defendants in error.

The verdict is manifestly right, and will not be disturbed on account of immaterial errors. All matters in controversy here have been already tried in the ejectment suit between the same parties.

GEORGE, C. J., delivered the opinion of the court.

In February, 1875, the plaintiff brought an action of ejectment, including a claim for mesne profits, against the defendants in error, and recovered judgment therein in August, 1877. The jury in the action of ejectment assessed the sum of five dollars for mesne profits, and also assessed the value of the *locus in quo* (which was a town lot) at twenty-five dollars, and the value of the improvements made by the defendants at two hundred and fifty dollars. A judgment was rendered on this verdict in pursuance of the statute, Code 1871, § 1557. The plaintiff in error (who was the plaintiff in the ejectment suit) paid the value of the improvements, and received possession of the lot. In a few months after this, he commenced this action, before a justice of the peace, against the defendants in the ejectment suit, upon an open account for rent of the lot from the date of the commencement of the ejectment suit to the date of the rendition of the judgment therein, and also for thirteen dollars, "the amount expended in getting up records for the prosecution" of the said ejectment suit. On appeal to the Circuit Court, a judgment

was rendered against the plaintiff, and there was a motion for a new trial, which was overruled, and a bill of exceptions taken.

It is unnecessary to review the assignments of error based on the action of the court below during the trial, for it is manifest from the whole record that the verdict and judgment are correct. The plaintiff in error introduced in evidence the record of the ejectment suit, from which the foregoing facts in relation to that suit appeared. His contention now is, that, notwithstanding the recovery in that suit of mesne profits, he is entitled to recover rents from the commencement of that suit till its termination; that by the words prescribed by the statute, in the form of the declaration in ejectment, rents are only demandable in that action prior to its commencement. We do not regard this as the true construction of the statute. It is true that, in the form prescribed in the statute for a declaration where mesne profits are demanded, it is said that "the said plaintiff also demands of the defendant, the sum of — dollars, for the use and occupation of the said land by the defendant, from the aforesaid day" (the day on which plaintiff's right of possession accrued) "to the commencement of this suit, being at the rate of — dollars a year." But this is not to be regarded as a statement by the plaintiff of the amount for which he will demand judgment when a trial shall be had, but as the statement of the claim and demand of the plaintiff, as they existed at the commencement of the suit. And this is in exact accordance with the practice in all kinds of actions, the plaintiff's demand being stated as it exists at the commencement of the action. He could not state it as it might exist afterwards, for he could not know but that the defendant would surrender possession upon the service of the summons; or, if he did not, the plaintiff could not state what would be the amount of his demand at the termination of the suit, since he could not foresee at what time such termination would take place. No inference, therefore, in favor of the position that mesne profits are recoverable only up to the commencement of the action, can be drawn from the form of the declaration as prescribed in the statute.

There are other provisions of the same statute which clearly



indicate that mesne profits are recoverable after the commencement of the action. In § 1556, the jury are required to assess the value of the rent of agricultural land, on which there is a growing crop, at the time a judgment is rendered in favor of the plaintiff till such time as the crop can be gathered. In § 1557, the option is given in all cases to plaintiffs to sue for mesne profits separately, or in the action of ejectment; and provision is made, where mesne profits are sued for in ejectment, for the defendant to have the value of his improvements allowed as a set-off against mesne profits, and the excess, if any, adjudged as a lien on the land. This statute manifestly contemplates an assessment of the value of the improvements at the time of the trial, and an assessment also of mesne profits up to that time. Unless this were so, the plaintiff would be compelled to submit to a sale of the land, or to pay the value of the improvements, when there might be, owing to the length of the litigation, a large sum — larger than the value of the improvements — due to him by the defendant. The statute manifestly provides for a full and fair adjustment by the jury of all the claims which the defendant may assert for improvements, and of all claims which the plaintiff may have for mesne profits, and a striking of the balance between them.

This is the rule also in actions of detinue and replevin, damages for the detention or the value of the use of the property being recoverable up to the day of the trial. No good purpose could be subserved by limiting the right of recovery to the commencement of the suit, and such a rule would produce the identical evil which the statute allowing mesne profits to be recovered in ejectment was passed to remedy; viz., a multiplicity of suits, and the consequent increase of costs and trouble of litigation. The mesne profits accruing between the commencement of the action of ejectment and the trial — the subject-matter of this suit — were therefore involved in the ejectment suit; and upon well-settled principles, the judgment in that case is a bar to any further suit for them, whether the jury actually allowed them or not. *Agnew v. McElroy*, 10 S. & M. 552; *Johnson v. White*, 13 S. & M. 584.

As to the item of thirteen dollars sued on, it appears, from the record in the ejectment suit, that the clerk had embraced it in

his taxation of the costs. On motion of the defendants, the court retaxed the costs, and disallowed this item. It does not appear upon what ground the judgment of the court was pronounced. We are bound to presume that the court acted properly; but, whether it did or not, the judgment remains unreversed, and is final and conclusive on the parties, if the item be such that it might have been under any circumstances allowed in the taxation of costs. The evidence shows that this item was for records and copies of deeds, for use in the ejectment suit. If these records and copies were necessary as evidence in that suit, they were properly taxable in the bill of costs at the price of the legal fees for copying them. *Suffolk v. Mill Pond Wharf Corporation*, 5 Pick. 540; *Jackson v. Mather*, 2 Cowen, 584; *Jackson v. Root*, 18 Johns. 386. We are bound to presume that the item was rejected by the court, because such necessity was not shown.

*Judgment affirmed.*

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HENRY BISSINGER v. J. M. LAWSON.

1. CONTRACT. *Consideration. Ancestor and heir.*

The extinguishment of an indebtedness of an intestate is a sufficient consideration to support the bond of a distributee of his estate.

2. LIMITATION OF ACTIONS. *One year after administration.*

If the intestate died before his indebtedness was barred by the Statute of Limitations, it will not be barred thereby until one year after administration.

ERROR to the Circuit Court of Lee County.

Hon. J. A. GREEN, Judge.

*W. L. Clayton*, for the plaintiff in error.

The court below by instructing the jury that the son's bond, if given for his deceased father's debts, was without consideration caused the erroneous verdict. *Powell v. Jones*, 12 S. & M. 506; *Calhoun v. Calhoun*, 37 Miss. 668. The note and bond of the father were not barred, because he may have been absent from the State, and because, by the Code of 1871, there is no limitation as to sealed instruments.

*J. A. Brown*, on the same side, citing *Calhoun v. Calhoun*, 37 Miss. 668; *Botanico-Medical College v. Atchinson*, 41 Miss. 188; *Wren v. Hoffman*, 41 Miss. 616, and *Marsh v. Lisle*, 34 Miss. 173, contended that the burden of proof was on the defendant who attacked his own bond, and that he had failed to show that the bond or note of his father was barred, but that, they not being barred at his death, the statute would not run until administration on his estate. Code, 1871, § 2162.

*Barton & Cole*, for the defendant in error.

The Statute of Limitations is as good as payment, *Davis v. Minor*, 1 How. 183; and by its operation the note and bond of the father were extinguished, and could not be a consideration for the son's bond, which, being a mere benevolence, was not obligatory. Story on Contracts, §§ 420, 453; *Kerr v. Calvit*, Walker, 115.

CHALMERS, J., delivered the opinion of the court.

The defendant in error, Lawson, executed to the plaintiff in error his own bill single, or writing obligatory, in liquidation and satisfaction of a bond and a promissory note of his deceased father held by the plaintiff in error. When sued, he defended upon the ground that his obligation was without consideration, and the learned judge below instructed the jury that, unless there was some new consideration moving between the defendant in error and the plaintiff, the contract was void. This was erroneous. The extinguishment of the debt of his father was a sufficient consideration to support his own contract if there was a valid and subsisting indebtedness due from his father's estate. *Calhoun v. Calhoun*, 37 Miss. 668; *Marsh v. Lisle*, 34 Miss. 173. Whether there was such subsisting indebtedness from the father's estate depends in this case upon the question whether the old debts were barred by the Statute of Limitations, and this depends, so far as this record shows, upon the question whether they became barred during the father's lifetime. It is not shown that there had been any administration upon the estate, and if there was none, and if the debts were not barred at the father's death, they would not become so until one year after the qualification of an administrator. Code, 1871, § 2162. Excluding the time during

which the statute was suspended on account of the war, about six years and a half intervened between the execution of the bond and promissory note by him and his death. This period would bar the promissory note, but would not bar the bill single. The obligation of the son therefore seems, as the facts appear from this record, to be supported by a good consideration, to the extent of the amount due on the father's bond and no further. Subsequent developments may show a different state of facts.

*Judgment reversed and cause remanded.*

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B. C. ADAMS, ADM'R, ETC. v. B. K. WILLIAMS.

**LIMITATION OF ACTIONS.** *Death of party.*

If a person liable to an action dies before it is barred, the suit may be brought within one year and six months after the date of letters of administration. Code 1871, §§ 1184, 2162, 2170.

ERROR to the Circuit Court of Grenada County.

Hon. SAM. POWEL, Judge.

The Statute of Limitations of one year having been held to apply to an action brought May 16, 1877, against an administrator appointed Feb. 26, 1876, for an assault and battery by his intestate on Oct. 19, 1875, the plaintiff brought up the case.

*Lester & Bates* for the plaintiff in error, cited Code 1871, §§ 2152, 2162; *Johnson v. Pyles*, 11 S. & M. 189; *Byrd v. Byrd*, 28 Miss. 144; *Abbott v. McElroy*, 10 S. & M. 100; *McCoy v. Nichols*, 4 How. 31; *Lamkin v. Nye*, 43 Miss. 241; *Wilson v. Sibley*, 54 Miss. 656; Hutch. Code, 831; *Jennings v. Love*, 24 Miss. 249.

*C. L. Bates*, on the same side, argued the case orally.

*Golladay & Freeman*, for the defendant in error, cited Code 1871, §§ 1184, 2162, 2170; *Jennings v. Love*, 24 Miss. 249; *Clayton v. Merrett*, 52 Miss. 353; *Wilson v. Sibley*, 54 Miss. 656.

*R. H. Golladay*, on the same side, made an oral argument.

CAMPBELL, J., delivered the opinion of the court.

The tenth section of the act of Feb. 24, 1844, Hutch. Code,

831, contained the exception that, "in case of the death of the creditor or debtor before the expiration of the said term of three years, the further time of one year from the death of such creditor or debtor shall be allowed for the commencement of any such suit or action." In *Jennings v. Love*, 24 Miss. 249, it was held that the nine months after grant of letters of administration during which the administrator was protected from suit, should not be computed as part of the year allowed after the death of the party. Sect. 2162 of the Code of 1871, copied from the Code of 1857, is a substitute for the above-mentioned section of the act of 1844, and an extension of it to include other personal actions. Sect. 2170 provides that the time during which any person is prohibited by law from commencing an action shall not be computed as any part of the period of time limited. Sect. 1184 prohibits an action against an administrator in such capacity until after the expiration of six months from the date of the letters of administration.

In view of these statutory provisions, after the decision of the case cited, it is plain that the six months, after the date of the letters of administration, are not to be computed as part of the one year after the date of the letters of administration, and that the effect of the several statutes on the subject is to allow an action to be brought, in the case of a person liable to an action, who dies before the action is barred, within one year and six months after the date of letters of administration. Putting sections 2162 and 2170 of the Code together, they produce this result. We deprecate the evil liable to result from these provisions, but cannot disregard their plain import.

*Judgment affirmed.*

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EX PARTE J. T. BRIDEWELL.

1. BAIL. *Capital case. Rule in lower court.*

Under the Constitution of Mississippi, Bill of Rights, § 8, bail in a capital case is a matter of right, if a well-founded doubt of the prisoner's guilt be entertained. The rule in *Wray's Case*, 30 Miss. 673, affirmed; *Moore's Case*, 86 Miss. 137, *Beall's Case*, 39 Miss. 715, and *Street's Case*, 43 Miss. 1, criticised.

2. **SAME.** *Rule in Supreme Court.*

The Supreme Court applies the same rule, subject to the *prima facie* presumption that the decision appealed from was correct.

3. **SAME.** *Judicial discretion.*

If the proof of guilt is evident, bail in a capital case rests in sound judicial discretion, to be exercised only under exceptional circumstances.

4. **SAME.** *Habeas Corpus. Evidence. Continuance.*

Practice upon applications for bail by *habeas corpus*, as to the burden of proof, the evidence for the prosecution, postponement by the judge for further testimony, and as to the sufficiency of the bond.

APPEAL from the decision of Hon. UPTON M. YOUNG, Judge of the Eleventh District of Mississippi, refusing to admit the relator to bail.

*J. S. Morris*, for the appellant, filed a brief, and argued the case orally.

Under the Constitution of Mississippi, bail in capital cases is a matter of right where the proof is not evident or the presumption great; and the court has the power, in its discretion, to admit to bail in all cases. *Ex parte Wray*, 30 Miss. 673. The court can bail even in cases where the jury on the same evidence should convict. *Moore's Case*, 36 Miss. 137; *Beall's Case*, 39 Miss. 715. The testimony fails to raise a strong presumption either that the appellant fired the shot, or, if he did so, that he was actuated by malice; and the affray in which the deceased was killed having arisen without premeditation on the part of any of the participants, the prisoner was guilty, if at all, of manslaughter only.

*Warren Cowan*, for the State, made an oral argument and filed a brief.

The evidence showed that Bridewell fired the fatal shot, and the legal presumption is that he did it with malice. The rule in *Moore's Case*, 36 Miss. 137, and *Beall's Case*, 39 Miss. 715, has been overruled by subsequent decisions; and the rule in *Street's Case*, 43 Miss. 1, now prevails in this State. Under it, the evidence being conflicting, this court cannot reverse. Even if the court was to try the question as original, the proof of guilt is evident, and no special circumstances are shown to

entitle the appellant, as a matter of favor, to what the facts do not authorize as of constitutional right.

*W. B. Pittman*, on the same side, argued orally and in writing.

The true rule applicable to bail under our Constitution is that laid down in *Ex parte Wray*, 30 Miss. 673. While the court has unlimited power to bail, it will not do so in the absence of special reasons, except where it is a matter of right. In the case at bar, express malice was clearly proved, and the crime of murder distinctly made out. Since *Street's Case*, 43 Miss. 1, this court has not treated the question of bail as an original one, but has regarded it as entitled to the same presumption of correctness as any other case on appeal. The judge below certainly committed no error, which is apparent from the facts stated in the record.

*T. C. Catchings*, Attorney General, on the same side.

CHALMERS, J., delivered the opinion of the court.

By the organic law of the State, it is declared that "excessive bail shall not be required; and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident or presumption great." Bill of Rights, § 8. This provision makes the granting of bail mandatory in all cases not excluded by the exception, but does not prohibit it in cases falling within the exception. In other words, all persons have the constitutional right to be bailed, except when the proof is positive or the presumption great that they have been guilty of a capital offence; and, even when the proof against them is of this character, they may be admitted to bail within the sound discretion of the presiding judge, if there be exceptional circumstances that seem to demand it. The admission to bail, however, where there is evident proof or great presumption of guilt of a capital offence is not a constitutional right, but a matter resting in the sound judicial discretion of the trial judge, who should not grant it, save under extraordinary circumstances, such as serious and probably fatal injury to health, or unusual and protracted delay upon the part of the State in bringing the prisoner to trial.

What rule should be applied in determining whether the applicant for bail has negatived the existence of evident proof or great presumption of the commission of a capital offence, and has thereby established his constitutional right to be released from imprisonment? We remark, in the first place, that the judicial officer who hears the application is the trier of the facts, and acts upon the conviction that the testimony leaves upon his own mind. He must give or deny bail according to his opinion upon the question whether a case has been made out which brings the prisoner within or without the constitutional rule. When we sit in revision of his judgment, we act upon the conviction made upon us by a perusal of the testimony contained in the record, giving to the judgment of the inferior officer that *prima facie* presumption of correctness, which attaches to the judgment of all courts of competent jurisdiction, strengthened in this class of cases by the fact that he has seen the witnesses, and heard them testify under circumstances which made it his duty to attend to their bearing and determine their credibility.

What strength of proof shall be regarded as having made guilt evident, or the presumption of it so great as to bring the accused within the constitutional exception, and deprive him of the legal right to demand enlargement upon bail? It was said by the High Court of Errors and Appeals in *Moore's Case*, 36 Miss. 187, 142, and again in *Beall's Case*, 39 Miss. 715, that the court might admit to bail "even in cases where the jury might, or perhaps ought, on the same evidence, to render a verdict of guilty for murder." If by this it was meant that this court or the presiding judge, on the hearing of a writ of *habeas corpus*, might, in its discretion and under the exceptional circumstances alluded to above, grant bail even though the relator had not made out a case by which he was constitutionally entitled to demand it, we approve the remark; but if it was meant that the applicant, in the absence of such exceptional circumstances, can ever be said to have established a legal right to demand enlargement by testimony which would make it the duty of a jury to convict him of a capital crime, we dissent from it. A jury ought not to convict if there is a reasonable doubt of guilt, and therefore to say that the accused is constitutionally



entitled to bail, when there is no reasonable doubt of his guilt, is manifestly to nullify the provision of the Bill of Rights, which limits the absolute right to cases where the proof is not evident nor the presumption great. It would be difficult to give a meaning to these words if they do not embrace a case where guilt has been established beyond all reasonable doubt.

In *Street's Case*, 43 Miss. 1, 29, reference was made to, and an extract quoted from, *Commonwealth v. Keeper of the Prison*, 2 Ashmead (Penn.), 227, 234, in which the rule was announced that bail would be denied in all cases where a court would refuse to set aside a verdict of conviction of a capital crime. This rule, we think, is as plainly violative of the organic law, on the other extreme, as the remark of the High Court of Errors and Appeals in the cases above cited.

A verdict of conviction where no error of law has intervened will never be set aside unless manifestly wrong, or, as is sometimes said, if there be any evidence to support it. To say that bail will only be granted where there is no evidence showing guilt, or where the proof of guilt is so slight upon the whole testimony that a conviction would be manifestly wrong, is plainly inconsistent with the constitutional requirement that it shall be granted in all cases except where the proof is evident or the presumption great. The error of the Pennsylvania rule is in failing to give due effect to a verdict of conviction, or in overlooking the vast change it effects in the attitude of the party. By it the legal presumption of innocence is overthrown, all doubtful questions of fact are resolved in favor of the State, and the credibility or non-credibility of witnesses is conclusively established. As before remarked, where no error of law has been committed to the prejudice of the accused, the verdict will not be set aside, unless the court can say that it is without evidence to support it, or that upon a review and inspection of all the evidence the finding is plainly erroneous. To apply such a test to a proceeding for bail, and to declare that it will be denied unless the relator has demonstrated that the evidence against him is of a like unsatisfactory character, is to reverse the constitutional requirement that it shall be granted unless the proof of guilt be evident or the presumption great.

We think the true rule is announced in *Wray's Case*, 30 Miss.

673, 681, namely, that "if a well-founded doubt" (of guilt) "can even be entertained, then the proof cannot be said to be evident nor the presumption great," and in such case bail must be granted.

In announcing our concurrence in the rule laid down in *Wray's Case*, we are not to be understood as declaring our approval of the application of that rule to the facts of that case, as to which there was a want of unanimity among the members of the court, but only as adopting the principle of law which seems to have met the undivided assent of that court as it does our own.

Upon an application for bail by writ of *habeas corpus*, the burden is upon the relator to show that he is illegally deprived of his liberty; and the officer hearing the case should require the production of all the available testimony for the prosecution, and should, if necessary, postpone the hearing until it can be obtained. If, upon the whole testimony adduced before him, he entertains a reasonable doubt, whether the relator committed the act or whether in so doing he was guilty of a capital crime, he should admit him to bail in such sum and with such sureties as will in his opinion certainly ensure his appearance. If bail is refused, and the matter comes before us for review, we shall apply the same rule, keeping in mind the *prima facie* legal presumption that the action of the judge below was correct.

Under the rule thus announced, we think the relator in the present case is entitled, under the proof now before us, to be enlarged upon bail; and, in view of the showing made as to his poverty, we fix the amount at five thousand dollars, to be obligatory, jointly and severally, for the full amount upon himself and two good and solvent sureties to be approved by the judge from whose order this appeal is taken.

*Ordered accordingly.*

## W. S. EPPERSON, GUARDIAN, ETC. v. W. L. NUGENT.

1. INFANT. *Necessaries. Counsel fees. Exceptional case.*

An infant is not generally bound for counsel fees as necessities; but where there is no guardian, the infant's estate is liable for the fees of counsel whose services contributed to secure it.

2. SAME. *Chancery. Jurisdiction.*

The Chancery Court in which a guardian is subsequently appointed has, under our system (Const., art. 6, § 16; Code 1871, § 976), jurisdiction of a petition to ascertain proper compensation, and decree its payment out of the infant's estate.

APPEAL from the Chancery Court of Yazoo County.

Hon. E. G. PEYTON, Chancellor.

The appellant demurred unsuccessfully to the petition of the appellee, filed in the court in which the former was appointed guardian, to subject the ward's estate to liability for counsel fees earned by the latter by the recovery thereof for the infant, before the appointment of a guardian.

*W. S. Epperson*, the appellant, *pro se*.

The infant could not of course contract for the services of a lawyer, and having no guardian no express contract was made with the appellee. His appearance in the Supreme Court with other counsel, *Vaughan v. Bunch*, 53 Miss. 513, if considered as "necessaries" furnished the infant, is a demand resting in an implied contract for the reasonable value of the services. The jurisdiction is claimed under Code 1871, § 976, and the later decisions, beginning with *Bank of Mississippi v. Duncan*, 52 Miss. 740, and ending with *Buie v. Pollock*, 55 Miss. 309. But it is doubtful if the "original dimensions" of the Chancery Court, mentioned in the latter case, enable it to hear and determine a case like this. 1 Parsons on Contracts, 296, 297; Tyler on Infancy and Coverture, §§ 73, 76. The solicitor has his remedy by suit at law for his fee in this as in other cases. *Re Southwick*, 1 Johns. Ch. 22; *Stewart v. Flowers*, 44 Miss. 513; 2 Greenl. Evid. § 365. The appellant has a right to trial by jury, which the Chancery Court is not bound to allow. Code 1871, § 1032. Although the opinion of this court in *Smith v. Everett*, 50 Miss. 575, 581, has been overruled, yet it properly states that, "the equity

jurisdiction conferred upon the Chancery Court by the existing constitution cannot be enlarged by legislative enactment; common-law powers cannot be thus given to it."

*Robert Bowman*, on the same side.

This suit is against the infant, not the guardian, and is on the infant's contract, not the guardian's. Infants are sued in the same manner as adults. Tyler on Infancy and Coverture, 121, 175, 185, 203. An infant can be bound by no contract except for necessities, 1 Parsons on Contracts, 313; within which class attorneys' fees do not fall. Weeks on Attorneys, § 342. It is a question for the court whether the articles furnished are within the class of necessities, but a jury must pass on their adaptation to the infant's wants. *Peters v. Fleming*, 6 M. & W. 42. It follows that the Chancery Court had no jurisdiction of the case, and that the petitioner failed to state a case entitling him to the relief prayed. This is not altered by Code 1871, § 976, which provides that the court in which a guardian has been appointed shall have full power and jurisdiction to hear and determine all questions in relation to the execution of his trust, and all demands against the estate, because the implied contract sought to be enforced was with the infant, and the guardian has no fund upon which the appellee has a lien. This construction is recognized in *Buie v. Pollock*, 55 Miss. 309. Chancery Courts have gone no farther than to order, when a fund is in court as the result of litigation, that the solicitors by whose services it was realized be paid therefrom. *Methodist Church v. Jaques*, 3 Johns. Ch. 1. The court will control and direct a trust fund. *Roundell v. Curren*, 6 Ves. 250; *Shortbridge's Case*, 12 Ves. 28. But here there is neither a trust fund nor a lien on the property for the fee. *Stewart v. Flowers*, 44 Miss. 513.

*W. L. Nugent*, the appellee, *pro se*,

Reviewing the cases referred to in Weeks on Attorneys, § 342, contended that they did not support the text. The ordinary fees of an attorney for the prosecution of an infant's rights to property cannot generally be said to be necessities; but when such services are requisite for the personal relief, protection, and support of the infant, the case is changed.

*Munson v. Washband*, 31 Conn. 303. If an impecunious infant has rights to property which, if recovered, would supply him food and make him a useful citizen, he should not starve because "his rights are not prejudiced" and because "he ought to have a guardian." It is not wonderful that Bacon and Coke took no notice of attorneys, who in their day were not allowed or expected to exact compensation; but the words they use, "necessary meat, drink, apparel, physic, and such other necessities," (5 Bac. Abr. 118), imply that the term is flexible, and the courts in future ages are left to say, in each case as it arises, what is necessary. *Breed v. Judd*, 1 Gray, 455; 1 Comyn on Contracts, 156; *Clarke v. Leslie*, 5 Esp. 28; *Helps v. Clayton*, 17 C. B. N. s. 553; 2 Greenl. Evid. § 365.

CAMPBELL, J., delivered the opinion of the court.

The liability of an infant for necessities is based on the necessity of his situation. As he must live, the law allows to any one supplying his wants a reasonable compensation. The law implies the promise to pay from the necessity of his situation. What are "necessaries" cannot be determined by any arbitrary and inflexible rule. It depends on circumstances, and each case must be governed by its own. It is stated in the books that the wants supplied must be personal to the infant, either for the body or the mind, in order to come within the description of necessities, and that counsel fees and expenditures in a lawsuit are generally excluded. This is, no doubt, the general rule, and for an obvious reason. Usually an infant who has an estate has a guardian, who may and should engage and pay counsel, where the interests of the infant committed to his guardianship require it.

When an infant has no guardian, but has rights involved in litigation, and a lawyer has espoused the cause of the infant and devoted his services to the protection of the interests of the infant in such litigation, and as the result of the litigation an estate has been secured to the infant, it is just and proper, and within the principle on which an infant is held liable for necessities, that the reasonable fees of such counsel should be paid out of the estate thus obtained. If the infant had had a guardian who had employed and paid counsel, he would have

been entitled to reimbursement out of the estate of his ward for the reasonable fees so paid, to be allowed on settlement by the Chancery Court. Shall the fact that the infant had no guardian, until the acquisition of the estate involved in the litigation in which the services of counsel were rendered made one necessary, deprive counsel of just compensation? We say, no! It will operate for the benefit of infants to allow just compensation for counsel fees and expenditures in their behalf in maintaining their rights in litigation which results in securing to them the means of supplying their wants. In *Pugh v. Dorsey*, 8 S. & M. 379, the jurisdiction of the Chancery Court to decree compensation to a lawyer who had rendered his services, as such, to minors was denied, on the ground that his remedy, if any, was at law. At that time the Probate Court had exclusive jurisdiction of minors' business, and the Chancery Court had nothing to do with minors as such. Now the Chancery Courts have jurisdiction of minors' business, and "of all demands against the same." Const. art. 6, § 16; Code 1871, § 976.

The petition prays that the court shall ascertain what is a proper compensation for the services of the petitioner, and direct its payment by the guardian out of the estate of the minor, which the services of the petitioner contributed to secure. The court to which this application is made has jurisdiction of the person and estate of the minor, and is the appropriate tribunal to determine the matter brought before it by the petition. The case made by it commends itself to favorable consideration from the exceptional circumstances it presents.

*Decree affirmed.*

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W. J. STEPHENSON v. MARY A. MILLER ET AL.

1. **MARRIED WOMAN.** *Deed of trust. Ejectment by beneficiary.*

If the trustee in a deed of trust by a married woman to secure her husband's debt has sold the land to the beneficiary, the latter can maintain ejectment.

2. **SAME.** *Mortgage for husband's debt. Rights of mortgagee.*

The beneficiary, when in possession, is entitled only to the income until payment of the debt, or the death of the woman.

3. **SAME.** *Mortgagee in possession. Account. Redemption.*

The married woman can maintain a bill to redeem, or for an account against such beneficiary in possession.

ERROR to the Chancery Court of Prentiss County.

Hon. L. HAUGHTON, Chancellor.

*Robins & Allen and Finley & Selmon*, for the plaintiff in error.

Stephenson, by virtue of the deed in trust, was clearly entitled to the rents. *Foxworth v. Magee*, 44 Miss. 430; *Erwin v. Hill*, 47 Miss. 675; *Dibrell v. Carlisle*, 48 Miss. 691; *Viser v. Scruggs*, 49 Miss. 705, 714; *McDuff v. Beauchamp*, 50 Miss. 531; *Hand v. Winn*, 52 Miss. 784. If he was not entitled to possession, that defence should have been made in the ejectment suit, and is now *res adjudicata*. *Carmichael v. Hunter*, 4 How. 308; *Pugh v. Holt*, 27 Miss. 461; *Agnew v. McElroy*, 10 S. & M. 552; *Rice v. King*, 7 Johns. 20; *Bagot v. Williams*, 3 B. & C. 235; *Brockway v. Kinney*, 2 Johns. 210; *Wheeler v. Van Houten*, 12 Johns. 311; *Lawson v. Shotwell*, 27 Miss. 630; *Johnson v. White*, 13 S. & M. 584; *Hodge v. Mitchell*, 27 Miss. 560; *Moody v. Harper*, 38 Miss. 599; *Manly v. Kidd*, 33 Miss. 141; *Stewart v. Stebbins*, 30 Miss. 66; *Miller v. Palmer*, 55 Miss. 323, 335.

*J. P. Carraway and B. B. Boone*, for the defendant in error.

The equity relied on in the bill could only be established in a court of chancery. Stephenson held the legal title by purchase from the trustee, and a court of law would not take notice that he was entitled to the income alone. Mrs. Miller's interest could not be affected by the ejectment suit, and it was unnecessary and improper to make the defence until its termination. *Hill v. Billingsly*, 53 Miss. 111; *Wildy v. Bonney*, 35 Miss. 77; *Ham v. Schuyler*, 2 Johns. Ch. 140. Stephenson took the legal title subject to Mrs. Miller's equity, whereof, as a party in interest, he is chargeable with notice. The rights of parties to deeds of trust are within the jurisdiction of Chancery Courts, especially where equity causes such

instruments to speak a language different from that used in them. In several cases involving charges on the separate estates of married women, this court has stated that their rights were peculiarly of equitable cognizance.

CHALMERS, J., delivered the opinion of the court.

Mrs. Miller, jointly with her husband, executed a trust-deed on her separate real estate to secure a promissory note of her husband, held by W. J. Stephenson. Default in payment having occurred, a sale of the land was made by the trustee, and the creditor, Stephenson, became the purchaser. He brought an action of ejectment on the deed received from the trustee and recovered judgment. A writ of *habere facias possessionem* having issued, this bill was filed by Mrs. Miller to enjoin the execution of the writ and to cancel the deed delivered by the trustee. If we gather correctly the theory upon which it is framed, it is that a creditor of the husband holding a trust-deed or mortgage upon the separate estate of the wife is never entitled to possession of the property, but must resort to a court of equity, and have it placed in the hands of a receiver, so that the income may thus be applied to the payment of the debt. This theory is correct only to the extent that where the creditor resorts to a court of equity for a foreclosure, as he may always do, the court, instead of going through the empty formality of making a sale which will convey only the income, will accomplish the same result more satisfactorily and beneficially to all parties by putting the property in the hands of a receiver. But when the wife has conveyed the legal title, or has authorized a trustee to do so for her by an act *in pais*, she must be held to have contemplated the legal consequences of her own act, so far as she is by law empowered to accomplish them. Her grantee therefore is clothed with the legal title, and with the right to subject the rents and profits of the property to the payment of his debt. He has not acquired ownership of the land, but he occupies, or is entitled to occupy, the position of a mortgagee in possession. His deed is only a mortgage, but having become by the act of the woman invested with the legal title, and the law constituting the instrument a conveyance of the



rents and profits, there can be no reason for denying him the right to enter and thus become his own receiver. He will hold of course only for the enjoyment of the income, and will be liable to all the burdens of a mortgagee in possession and accountable as such. The married woman will have the right to redeem at any time, and whenever she has reason to believe that the income, or fair rental value of the property, has extinguished the debt, she can file her bill for an account. The creditor's right of possession will, in any event, terminate at her death, *Reed v. Coleman*, 51 Miss. 835; and during its continuance he will be bound to the same measure of diligence in taking care of the property and making it productive as any other mortgagee in possession. In this case, the sale by the trustee had no other effect than to transfer the legal title and enable the creditor to bring ejectment. He still remains, in the eyes of a court of equity, a mere mortgagee of the income; but, if the property had been purchased at the trustee's sale by a stranger without notice of the wife's rights, different and perhaps more difficult questions might arise. It would seem most unwise for a married woman to permit such a sale to take place, or to consent that incumbrances of her property for her husband's debts should assume the form of absolute conveyances.

*Decree reversed, and bill dismissed without prejudice.*

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M. A. ANDING v. R. LEVY ET AL.

1. PRIVILEGE TAX. *Unlicensed trader. Illegal contract.*

Under the fifth section of the privilege-tax law (Acts 1875, p. 10) an unlicensed trader's contracts are illegal only when made while he was in default.

2. STATUTES. *Repeal. Penalty. Pending suits.*

In the absence of a saving clause, the repeal of a statute imposing a penalty to be recovered by action, or enforced by prosecution, ends all proceedings to enforce it.

3. PRIVILEGE TAX. *Void contract. Repeal of the statute.*

The fifth section of the privilege-tax law, which avoided contracts

57	51
70	110
57	51
75	339
57	51
81	236
57	51
83	107
57	51
91	689
91	714
57	51
e 95	201
L95	209

made by a trader while in default, was self-executing, and its subsequent repeal did not make such contracts valid.

4. SAME. *Re-enactment in repealing statute.*

That section, however, being re-enacted *ipsisssimis verbis* in the act of March 5, 1878 (Acts 1878, p. 12), which repealed the former statute, was not repealed, but continued law.

5. NEW TRIAL. *Exclusion of evidence. Immaterial errors.*

Where material and competent evidence has been excluded, the judgment will be reversed, unless the verdict would be clearly right, if the evidence had been admitted.

6. SAME. *Single issue.*

If the excluded evidence was pertinent to the only issue raised, this court, to affirm, must be satisfied that the evidence, if admitted, would have been insufficient to authorize a different verdict.

7. SAME. *Two issues. Case in judgment.*

If the evidence was pertinent to one of two issues, to justify the verdict on the second, which involved the trial of a fact, which is a conclusive answer to the claim set up under the first, it must appear that the second issue was tried, and that a contrary verdict thereon would be vacated.

8. SAME. *New points in Supreme Court.*

But in the last case it is sufficient, if, as in *Bell v. Medford*, *ante*, 81, evidence, in its nature incontrovertible, as, for instance, a record, was introduced, which in law would have compelled the rendition of the verdict.

9. ACCOUNT STATED. *Definition. Payment.*

A stated account is an agreement, after an examination of the accounts between the parties, that the items are true, and the balance correct; and such an account, which shows itself satisfied, is evidence of payment.

10. SAME. *Merchants. Implied assent.*

The rule making an account rendered and retained without objection a stated account applies only in controversies between merchants.

11. SAME. *Admission. Evidence.*

But such rendering and retention between parties other than merchants is an element in the case for the consideration of the jury, so far as it shows an implied assent to the correctness of the account.

12. SAME. *Circumstances for the jury.*

In determining the weight to be given to such an account, the jury may, among other circumstances attending its rendition and retention, consider the intelligence and business capacity of the recipient, his confidence in the honesty and accuracy of the other party to the account, the length of time he has retained it, and his opportunities for examining it, as well as the course of dealing between the parties.

APPEAL from the Circuit Court of Lincoln County.

Hon. J. B. CHRISMAN, Judge, did not sit in this case, but Hon. A. G. MAYERS presided by interchange.

The appellee, her husband joining for conformity, sued the appellant in assumpsit for \$276.77 on an open account sworn to under the statute consisting of \$616.77 of debits extending from March to December, 1877, with credits thereon undated, amounting to \$340, and not applied to any particular items of debit. The defendant pleaded the general issue with counter affidavit denying certain items, and a special plea that the plaintiff had not taken out a license under the privilege-tax law; and the plaintiff joined issue. The plaintiff's counsel then served on the defendant a notice to produce at the trial the bills of goods bought by the defendant with the credits thereon. The defendant produced, and the plaintiff read in evidence, the account described in the opinion, for \$329, of items of debit extending to Sept. 13, 1877, balanced by credits similar to some on the account filed with the declaration, the last credit being dated Dec. 5, 1877, and the defendant stated that the plaintiff had delivered this account to him.

On the plaintiff's motion, the court excluded all the defendant's testimony in reference to the plaintiff's failure to pay the privilege tax, when it was due on May 1, 1877, or within thirty days thereafter; and refused to charge the jury for the defendant that, if the plaintiff was doing business as a merchant from March to December, 1877, she was liable to pay the privilege tax, and if she failed to pay it when due, or within thirty days thereafter, and to obtain a license to follow the business of a merchant, she could not recover for such goods as were sold after the time said privilege tax was due.

On a general verdict for \$235, there was a judgment for the plaintiff. A motion for a new trial, made by the defendant for error in excluding the testimony and refusing his instruction, was overruled.

*R. H. Thompson*, for the appellant.

Sect. 5, Acts 1875, p. 10, is clearly constitutional, and the action of the court was in violation of it. The clause which prohibits the maintenance of a suit is a part of the penalty imposed on a crime. It is as much the law of the State as the statute rendering void gambling contracts.

*A. C. McNair*, on the same side.

1. It was the policy of the statute, Acts 1875, pp. 3, 10, that a merchant who had not first paid his tax could not make a binding contract, and the act did not infringe the provision of the Federal Constitution prohibiting States from passing laws impairing the obligation of contracts. *Cooley on Const. Lim.* 284. The debt was contracted after the law was enacted. The legislature had power to impose the tax, *Stewart v. Potts*, 49 Miss. 749; and also power to regulate the penalty. In an analogous case, it has been decided that no action can be maintained on a contract the consideration of which is prohibited. *Deans v. McLendon*, 30 Miss. 343. A contract which violates the revenue laws of the country in which it is made is void. 2 *Parsons on Contracts*, 753; *Johnson v. Hudson*, 11 East, 180; *Cope v. Rowlands*, 2 M. & W. 149; *Smith v. Mawhood*, 14 M. & W. 452; *Meux v. Humphries*, 3 C. & P. 79; *Holman v. Johnson*, 1 Cowp. 341; *Armstrong v. Toler*, 11 Wheat. 258; *Cambioso v. Maffett*, 2 Wash. C. C. 98; *Hannay v. Eve*, 3 Cranch, 242; *Lightfoot v. Tenant*, 1 B. & P. 551; *Langton v. Hughes*, 1 M. & S. 593; *Ritchie v. Smith*, 6 C. B. 462; *Hodgson v. Temple*, 5 Taunt. 181; *Catlin v. Bell*, 4 Camp. 183. The circuit judge held that the repeal of the act of 1875 by the act of March 5, 1878 (Acts 1878, pp. 12, 28) deprived the defendant of that defence; but, if the debt was illegal, neither the defendant nor the legislature could impart to it validity. *Harris v. McKissack*, 34 Miss. 464; *Porterfield v. Butler*, 47 Miss. 165. If the act of 1875 was, so far as it related to merchants, repealed by the act of 1878 (Acts, 1878, pp. 12, 14), it could not affect this case, because under both the acts the privilege tax "on each store stock under two thousand dollars," is five dollars. The statute of 1878 is necessarily an amendment to the act of 1875. They are *in pari materia*, belong to one system, and are to be construed together. *Scott v. Searles*, 5 S. & M. 25; *Grand Gulf Bank v. Archer*, 8 S. & M. 151. Repeal by implication is not favored in law. *McAfee v. Southern Railroad Co.*, 36 Miss. 669; *Richard v. Patterson*, 30 Miss. 583; *Southern Railroad Co. v. Jackson*, 38 Miss. 334; *Commercial Bank v. Chambers*, 8 S. & M. 9; *Planters' Bank v. State*, 6 S. & M. 628. Such repeal, when allowed, extends

only so far as the statutes are manifestly repugnant, *White v. Johnson*, 23 Miss. 68, which these statutes are not.

2. But, notwithstanding the error of the lower court on the question of the privilege tax, the opposing counsel insist that the judgment should be affirmed, because the part of the account prior to the date of the license has been paid. This is not proved, for the plaintiff failed to establish the identity of the account which appears paid, with the first part of the account sued on, or to show the circumstances attending its delivery and retention. Again, it has been held that, where one of the debts is legal and the other illegal, a payment must be applied to the legal debt, *Wright v. Laing*, 3 B. & C. 165; and that payments on an illegal debt can be recovered back. *Worcester v. Eaton*, 11 Mass. 368, 376; *Bond v. Hays*, 12 Mass. 34; *Boardman v. Roe*, 13 Mass. 104; *White v. Franklin Bank*, 22 Pick. 181; *Peck v. Burr*, 10 N. Y. 294. Hence the payments, if applied to the account sued on, satisfy it in full. Further, the record does not show on which point the verdict is founded, and, to warrant an affirmance in such case, it must appear that there was no error in either. *Hills v. Eliot*, 12 Mass. 26. The jury may not have passed upon the latter issue.

*Sessions & Cassidy*, for the appellee.

1. The fifth section of the privilege-tax law of 1878 (Acts 1878, p. 23) repeals all other acts regulating taxes on privileges, including, of course, the act of 1875. It is true that the act of 1878 imposed a penalty similar to that of 1875, but that is prospective, and this was after the account sued on was contracted. The repealed statute contained the penalty relied on by the defendant below in his special plea. By the following cases, the effect of such repeal is illustrated: *Teague v. State*, 39 Miss. 516; *Yeaton v. United States*, 5 Cranch, 281; *Musgrove v. Vicksburg Railroad Co.*, 50 Miss. 677; *French v. State*, 53 Miss. 651.

2. But even if the statute was not repealed, and the court was wrong in excluding the testimony, still the verdict was right and the judgment should be affirmed. The evidence does not show that the plaintiff was in default at the time when the debt sued for was contracted. The verdict is

for the balance due, which embraces only those items which were sold after the privilege tax was paid. The instruction asked for the defendant below announced the startling proposition that if a merchant fails to pay a privilege tax at the time it is due, or within thirty days thereafter, he cannot subsequently comply with the law, but must permanently remain in the position of a violator thereof.

3. The constitutionality of these laws is not discussed, because the case of the appellee seems sufficient without it. But the question is not waived or conceded.

GEORGE, C. J., delivered the opinion of the court.

This was an action by a merchant against a customer to recover an open account accruing during the year 1877. One of the defences set up by the defendant was, that the plaintiff had failed to take out a license as a merchant within thirty days from May 1, 1877, and until August 1 of that year. And he insisted that not only so much of the account as was created during the term in which the plaintiff was in default was not collectible, but that the whole amount, including that part of it which was created subsequent to the time when the tax license had been obtained, was illegal and void.

The language of the act of 1875 (Acts of 1875, p. 10, § 5) is very broad in condemning transactions by persons who, being required to take out licenses, fail to do so within the time prescribed by the statute ; but we do not think that it is a fair construction of the statute to give it the extended operation contended for. The statute makes it a misdemeanor to do business without a license, and imposes a fine or imprisonment or both, in the discretion of the court, as a punishment ; and it then provides as follows :—

“ And any debts or claims that may accrue to any person, on account of the business herein taxed, who shall fail or neglect, within thirty days after such license is due, to pay the same, shall be null and void, and no suit shall be maintained in any court of law or equity in this State to enforce the payment of such claims, or a compliance with contracts in favor of any person or persons failing to pay the privilege tax required by this act.”

The provision of the statute is highly penal, and should not receive a construction which would extend it beyond the obvious purpose and object of the legislature in enacting it. This manifest object was to secure the payment of the license tax within the time limited, or at the earliest possible day afterwards. It was no part of the purpose of the act to condemn or discourage the business or calling upon which the license tax was imposed. The declaration of the illegality and nullity of the contracts of the unlicensed party was in aid of the collection of the public revenue. A construction of the statute which would not allow a subsequent compliance to relieve a party from the incapacity to carry on business occasioned by a temporary failure to pay, would take away a strong inducement to the defaulter to comply with the law by a payment of the license. The act also requires the tax collector to collect by distress the whole amount of the yearly license tax from any defaulter. It would be highly inequitable to enforce the collection of a tax as a license for carrying on business, and then to prevent the transaction of the business. We are, therefore, of the opinion that the illegality of the contracts of an unlicensed trader applies only to such contracts as were made during the time the trader was in default.

The court below, however, did not sustain the defence even to the extent above indicated; but excluded from the jury all the evidence which had been introduced showing that the plaintiff had not paid the license tax till August 1, 1877. This action of the court, as we learn from the brief of counsel, resulted from the opinion entertained by the learned circuit judge that the invalidity of contracts made by unlicensed traders, as provided for in the act of 1875, above quoted, was a penalty imposed for a violation of that act; and that this act having been repealed by the act of 1878 (Acts of 1878, p. 23, § 5), the penalty could not afterwards be enforced.

The principle that the repeal of a statute imposing a penalty to be recovered by a civil action, or to be inflicted through a criminal prosecution, puts an end to all proceedings, civil and criminal, intended to enforce the penalty, unless there be a saving clause in the repealing statute, is well settled, and has been fully recognized by this court. *Musgrove v. Vicksburg Railroad*

*Co.*, 50 Miss. 677. The foundation of the principle is, that, after the repeal of the statute, no law exists which provides for the penalty or authorizes its enforcement. The repeal of a statute is held to have the effect of expunging it from the statute-book as completely as if it had never existed, except as to rights which have vested under it. All actions pending at the time of the repeal, and all proceedings then uncompleted, which have for their foundation the repealed statute, fall with it; only such as are fully completed or ripened into judgment are not affected by the repeal. It is said, as to pending actions, that they must fall with the repeal, because when the court comes to pronounce judgment it finds itself without a law authorizing a judgment to be rendered. *Allen v. Farrow*, 2 Bailey (S. C.), 584.

But these principles do not apply to this statute. For although the statutory provision for the invalidity of the contracts made by an unlicensed trader may be regarded to some extent as in the nature of a penalty or punishment on him for his illegal conduct, yet it is a punishment not inflicted through the instrumentality of any suit at law or equity. So far as it is a penalty or punishment, it is inflicted and enforced at the very moment the illegal act is consummated, without the intervention or aid of any legal proceedings whatever. The statute is self-executing. The violator of the statute becomes his own punisher, in the very act of the breach of its provisions. And hence a repeal of the statute, if we give the repeal a prospective operation only, can have no effect on that which was then done and consummated. We cannot give the provisions of a statute a retrospective force without express words to that effect; and it is not pretended that there are such words in this statute. In accordance with this view we find it well settled that the repeal of a statute making certain contracts void does not have the effect to validate such contracts. *Gilliland v. Phillips*, 1 S. C. 152; *Bancher v. Mansel*, 47 Maine, 58; *People v. Brooks*, 16 Cal. 11; *Hathaway v. Moran*, 44 Maine, 67; *Milne v. Huber*, 3 McLean, 212; *Roby v. West*, 4 N. H. 285; *Jaques v. Withy*, 1 H. Black. 65. But so much of the act of 1875 as is above set out is not repealed by the act of 1878 (Acts of 1878, p. 23, § 5); though the repeal of



the whole act seems to be within the express words of the repealing clause. The act of 1878 re-enacts in the same words that part of the act of 1875, above quoted, which invalidates contracts made by unlicensed traders.

There is some diversity in the authorities as to the effect of a repealing act upon so much of the repealed act as is re-enacted in the former. In Louisiana, it was held that the matter of the first statute contained in the repealing act was to be considered as having been once so effectually abrogated as to defeat all prosecutions for offences against the provision so contained which had been committed before the repeal. *State v. King*, 12 La. An. 593. And the same view seems to have been taken in Maine and New Hampshire. *Coffin v. Rich*, 45 Maine, 507; *Lisbon v. Clark*, 18 N. H. 234. But a contrary view is held in Wisconsin; *Laude v. Chicago Railway Co.*, 33 Wis. 640; *Fullerton v. Spring*, 3 Wis. 667; *Hurley v. Texas*, 20 Wis. 634; *State v. Gumber*, 37 Wis. 298, 302; and also in New Jersey; *Middleton v. New Jersey Railroad Co.*, 26 N. J. Eq. 269; *Randolph v. Larned*, 27 N. J. Eq. 557, 558, 562; and in Maryland; *Dashiell v. Baltimore*, 45 Md. 615; and in Georgia; *Ballin v. Ferst*, 55 Ga. 546; and in Massachusetts, *Wright v. Oakley*, 5 Met. 400, 406; and by the Supreme Court of the United States in *Steamship Co. v. Joliffe*, 2 Wall. 450, 458. We regard these last-named authorities as founded on the better reason. When a statute expressly repeals another, yet contains in it a provision of the former statute identical in language, — as is the case now before us, — or even identical in substance, it cannot be said that as to that provision there has been any repeal. The repeal of a statute puts an end to it, expunges it from the body of the laws of the State; and it is for this reason that the consequences before alluded to are held to flow from it. But it is manifest that such has not been the condition of the provision under consideration, and which was contained in the repealing act. As to that, there never has been any change. There has never been a single instant since its first enactment when it was not in full force and operation as the law of the State. The vice in the argument of the authorities we have rejected consists in attaching to the word “re-enactment” the sense of “revivor.”

There can be no revivor unless there has been a previous death ; and there has not been for a single instant a cessation or suspension of the life and vigor of this provision since its first enactment, for the repealing statute went into operation the very instant of the repeal of the other ; and until such operation there could be no repeal of the former, for that repeal is only effected by the vigor and operation of the latter. It is not proper legal language, therefore, to apply the word "repeal" to that part of a statute which is re-enacted in the statute which repeals the former. The effect of such action is properly an uninterrupted continuation of the provision, — a translation of it in all its vigor and force, — not a destruction of it, and then a resurrection. It, therefore, follows that the action of the court, in excluding the evidence showing the non-payment of the license-tax, was erroneous.

But it is insisted that, notwithstanding this error, the verdict was manifestly correct on the whole evidence, and that the judgment should be affirmed. We cannot affirm a judgment when material and competent evidence was excluded from the jury, unless it is very clear that the verdict as rendered would be right if the excluded evidence had been admitted. If the excluded evidence was pertinent to the only issue raised by the pleadings and evidence, then we must be satisfied that, if it had been admitted, it would not have been legally sufficient to authorize the jury to find a verdict different from the one they did find. If the excluded evidence was pertinent to one of two issues submitted to the jury, and it is urged that the verdict is justified on the last issue, which issue involved the trial of a fact which is a full answer to the claim set up under the first issue, as is the case at bar, then we cannot affirm, unless we are satisfied that this last issue was fully and fairly tried before the jury, and that a contrary verdict on it should have been set aside by the court ; or unless it should appear that evidence was introduced which in its nature was unimpeachable, as a record, and which in law would have compelled the rendition of the verdict sought to be affirmed. In the last class is the case of *Bell v. Medford*, ante, 31, decided at this term.

It is contended that the plaintiff below rendered an account to the defendant covering the whole period during which she

was without a license, and that, of the credits to which the defendant was entitled, a sufficient amount was placed on the account so rendered to balance it, whereby the account was actually paid, so far as it was illegal. It is contended that this account is not only to be considered as a stated but also as a settled account. The evidence on this subject, as reported in the bill of exceptions, is very meagre. The whole of it amounts to no more than this, that on the cross-examination of the defendant he, in pursuance of a previous notice given him by the plaintiff, produced an account, the last item of which on the debit side is dated Sept. 18, 1877, and the last item of credit bears date December 5, following; and the credits seem to be equal to the debits. The defendant was asked no questions by either side as to the account, nor was any other witness examined in relation to it. Nothing in fact appears in reference to the account, except the mere fact that it was produced by the defendant in pursuance of a notice served on him by the plaintiff. It does not appear when the account was rendered, nor under what circumstances.

The action is based upon an account in favor of the plaintiff, commencing on the first day of March, 1877, and ending December 1, following. It embraces the whole period of the transactions between the parties, including that embraced in the account rendered. There is no item in it which indicates that an account had been rendered; but the items of charge, each being for the specific article sold, run regularly and without any interruption from March 1, to December 1, amounting in the aggregate to \$616.77; and then follow credits to the amount of \$340, without any dates. This account, as an open account, was sworn to by the plaintiff, under the statute, and filed with his declaration. The account claimed to be rendered, and therefore a stated account, commences with the beginning of the transaction between the parties, and the last item of debit in it is dated Sept. 18, 1877. It contains on the credit side the first six items of credit embraced in the account sued on, the sixth item of credit being dated, in the account rendered, December 5, 1877. By this it appears that this account was not rendered till after December 5, 1877. No explanation is given why this rendered account,

thus shown to have been made after the date of the last item of debit in the account sued on, should, as to its debit side, stop on September 18, leaving out items of charge against the defendant exceeding the sum of \$200, which accrued before the date of the last item of credit in the account. It is clear that it is not an account of the whole of the transactions between the parties up to the date it was made out. If it were regarded as a stated account, it must be regarded also as showing the true balance, if any, due by the defendant at the date at least of the last item on either side of the account. This date has been shown to be December 5, 1877, and under this theory, if we regard the account as stated, it would show that nothing was due to the plaintiff, as the account is exactly balanced. In this view, the account rendered would not be the proof which would show the verdict to be clearly right, but the contrary. But under the rules of law the account thus rendered cannot be considered under the circumstances proved as a stated account.

A stated account is defined to be an agreement, after an examination of the accounts between the parties, that all the items are true, and the balance struck a just and true balance. *Stebbins v. Niles*, 25 Miss. 267, 348; *Davis v. Tiernan*, 2 How. 786, 804. But it is said that this agreement need not be express, but may be implied from circumstances; and, among these circumstances, are the rendition of an account by one of the parties, and its retention without objection by the other. This rule which presumes the acquiescence of the party to whom an account was rendered, from his mere failure to object to it, needs some explanation in the state in which we find the authorities. The earliest mention we have been able to find of this rule is in *Sherman v. Sherman*, 2 Vern. 276, decided in the year 1692, where the rule is stated by Lord Hutchins thus: that "among merchants it is looked upon as an allowance of an account current, if the merchant that receives it does not object against it in a second or a third post." Lord Hardwicke in *Willis v. Jernegan*, 2 Atk. 251, spoke of the rule thus, "even where there are transactions, suppose between a merchant in England and a merchant beyond sea, and an account is transmitted here from the person who

is abroad, it is not the signing which will make it a stated account, but the person to whom it is sent, keeping it by him any length of time, without making any objection, which shall bind him, and prevent his entering into an open account afterwards." Chancellor Kent in *Murray v. Toland*, 3 Johns. Ch. 569, mentioned the rule in these words: "It has been often held, that if a party receives a stated account from abroad, and keeps it by him for any length of time (one case says two years) without objection, he shall be bound by it;" citing *Willis v. Jernegan*, *ubi supra*, and *Tickel v. Short*, 2 Ves. 239, in which last case, Lord Hardwicke said: "If one merchant sends an account current to another in a different country, on which a balance is made due to himself; the other keeps it by about two years without objection: the rule of this court and of merchants is, that it is considered as a stated account." The Supreme Court of the United States in *Freeland v. Heron*, 7 Cranch, 147, spoke of the rule as "a rule of the Chancery Court and of merchants," and defined it to be thus: "When one merchant sends an account current to another residing in a different country, between whom there are mutual dealings, and he keeps it two years without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him, at least so far as to cast the *onus probandi* on him." It is thus seen that, in its inception, the rule that the reception of an account rendered, and the keeping of it for any considerable time without objection, made it an account stated, — that is, an account so admitted to be just and correct that it relieved the party rendering it from the necessity of proving it, and cast the burden on the party receiving it to show by affirmative evidence that it was unjust, — was a rule of the Chancery Court applied only in controversies between merchants.

The rule has been extended further in some States, so as to embrace transactions between other parties. In this State, there has as yet been no recognition of it except in cases between merchant and merchant, and when it has been referred to it has been in that way. Thus in *McCall v. Nave*, 52 Miss. 494, 498, it was said that "assent" (to a stated account) "might

be implied from circumstances, such as the receipt by one merchant of an account from another without making objections ;” and in *Stebbins v. Niles*, 25 Miss. 348, Smith, C. J., spoke of it as a rule in transactions between merchant and merchant. Greenleaf, in § 126, vol. 2, of his work on Evidence says an admission sufficient to create an account stated may be inferred, “if the account be sent to the debtor in a letter which is received, but not replied to in a reasonable time,” but he refers as authority for this to § 197 of vol. 1, of his work. This last-named section states the rule thus, “among merchants it is regarded as the allowance of an account rendered, if it is not objected to without unnecessary delay.” In Virginia in *Townes v. Birchett*, 12 Leigh, 173, the opinion of the majority of the court applying the rule proceeds on the assumption that both parties were merchants, though Judge Allen dissented upon the ground that this character of the parties was not shown. He said that he had not been able to find a single case, not between merchant and merchant, in which the rule had been applied. And this view was sustained by the Court of Appeals of Virginia in *Robertson v. Wright*, 17 Gratt. 534, 541. It is stated in Cowen and Hill’s notes to Phillips on Evidence, note 191, that the rule is inapplicable except as to transactions between merchant and merchant.

In some of the late authorities the rule that the rendition of an account, and its retention without objection, makes it a stated account is applied to transactions between other parties than merchants. It has been so recognized in the following cases, among others: *Lockwood v. Thorne*, 11 N. Y. 170; *Stenton v. Jerome*, 54 N. Y. 480; *Case v. Hotchkiss*, 1 Abb. (N. Y.) 324; *Towsley v. Denison*, 45 Barb. 490; *Terry v. Sickles*, 13 Cal. 427; *White v. Hampton*, 10 Iowa, 238; *Tharp v. Tharp*, 15 Vt. 105; *White v. Campbell*, 25 Mich. 463; *Philips v. Belden*, 2 Edw. Ch. 1. On consideration of the authorities, we have concluded not to extend the rule, making the rendition of an account, and its retention without objection a stated account, beyond its original limits; viz., controversies between merchant and merchant.

On the other hand, we do not follow some of the authorities, which hold that such rendering and retention is no evidence of

the correctness of the account. The rendering of an account and its retention without objection, as between other parties than merchants, is admissible to show an implied admission and acquiescence in its correctness. What weight should be given to it is for the consideration of the jury, under all the circumstances of the case. They may consider the character, as a business-man, of the party to whom the account was rendered — whether careful, accurate, and prompt in business matters, or the contrary; his intelligence or the want of it; his opportunities of examining the account, and of ascertaining whether it is correct; his dependence on his creditor, or the contrary; his confidence in the honesty and accuracy of the party who rendered the account; the length of time of the retention; the opportunities of making objections; the course of previous dealings between the parties, and all other circumstances attending the rendering and retention of the account; and from these determine the weight to be given to the evidence, in establishing its correctness.

*Judgment reversed and new trial granted.*

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HUGH A. MCLEOD v. MARTHA BURKHALTER ET AL.

57	62
90	82

TAX SALE. *Collector cannot purchase.*

A tax collector cannot purchase at his own sale.

APPEAL from the Chancery Court of Covington County.

Hon. T. B. GRAHAM, Chancellor.

The appellant filed this bill against the appellees to confirm his tax title; and their demurrer was sustained on the ground that he sold the land as tax collector and purchased at the sale.

*B. Taylor*, for the appellant.

No statute of this State prohibits a tax collector from bidding at his own sale, nor does his so purchasing contravene public policy. If he sold the land for too little, or exacted too much from the tax payer, such fraud may be proved.

*Edward A. Gibson*, for the appellees.

A tax collector cannot purchase directly or indirectly at his official sale. *Chandler v. Moulton*, 33 Vt. 245. He cannot occupy a position where his private interest draws him in one direction and his duty in another. *Blackwell on Tax Titles*, 400.

GEORGE, C. J., delivered the opinion of the court.

There seems to be some difference in the authorities as to the right of a tax collector to purchase at his own sale land sold for taxes. We deem it to be the better opinion to deny such right. We see no reason why the ordinary rule, which condemns a sale when the purchaser is the person who makes the sale, should not apply to a sale made by a tax collector. The duty of a seller is inconsistent with the interest of a purchaser. As seller, it is the duty of the tax collector to get the highest possible price for the land he offers for sale; and, as a purchaser, it is his interest to secure it at the lowest price he can. When there is this conflict between duty and interest, the temptation is great to subordinate the former to the latter. It is the duty of a tax collector to give proper notice, and to collect the taxes, by a distress and sale of the personalty of the owner, before he proceeds to sell land for taxes; and when he makes a sale, it is his duty to realize the taxes by a sale of as little of the land as practicable. To allow him to bid at the sale would place him under a temptation to violate these duties. Besides, persons charged with the administration of the fiscal affairs of the people must be content with the gains provided for in the fees and salaries allowed by law, and should not be permitted to augment them by speculations in the funds or property which come under their official control. The decree of the Chancellor is in accordance with these views, and is, therefore,

*Affirmed.*



JOHN D. FREEMAN ET AL v. R. E. CUNNINGHAM.

57	67
82	806

1. **EJECTMENT.** *Outstanding title. Deed of trust. Statute of Limitations.*  
Recovery by the plaintiff in ejectment cannot be defeated by producing an outstanding deed of trust executed so long ago that the debt secured thereby is barred, and the security inoperative for want of remedy thereon. Code 1871, § 2150; *Griffin v. Sheffield*, 38 Miss. 359, affirmed; *Heard v. Baird*, 40 Miss. 793, overruled; and *Stadeker v. Jones*, 52 Miss. 729, explained.
2. **SAME.** *Deed of trust. Grantor's and trustee's titles. Privity.*  
None but the trustee in a deed of trust, or those claiming under him, can prevent a recovery on the grantor's title. Code 1871, § 2295. And a purchaser at a bankruptcy sale of the husband's title cannot set up a trust-deed, executed by husband and wife on the latter's land, for the purpose of defeating the title of the wife's vendee.
8. **SAME.** *Estoppel. Sale of land. Married woman.*  
The wife, in such case, is not estopped to assert her title by failing to object to the bankruptcy sale. *Sulphine v. Dumbar*, 55 Miss. 255; *Staton v. Bryant*, 55 Miss. 261, cited.

**ERROR** to the Circuit Court of Rankin County.

Hon. A. G. MAYERS, Judge, did not preside in this case; but S. H. TERRAL acted as judge *pro hac vice*.

John D. Freeman and Harvey Ware, the plaintiffs in error, brought ejectment June 11, 1875, claiming by a deed executed after her husband's death, by Mrs. Caroline Meadows, the original owner of the land. R. E. Cunningham, the defendant, introduced two deeds of trust executed by Mrs. Meadows and C. H. Meadows, her husband, to secure two notes, due Oct. 15, 1866, and Jan. 1, 1869, and proved that the land was included in the bankruptcy schedules of C. H. Meadows, and that by order of the Bankruptcy Court, made July 7, 1869, J. L. McCaskill, the assignee, sold it, as C. H. Meadows's property, to J. H. Butler, from whom Cunningham derives title, and applied the money to pay the secured notes. The court refused to instruct the jury, for the plaintiffs, that Caroline Meadows held the legal title notwithstanding the deeds of trust; that her deed to the plaintiffs conveyed to them the title against all persons except the trustees after condition

broken ; that if no sale had taken place, and the notes were barred by the Statute of Limitations, no sale could take place under the deeds, but they were barred also ; and that, if the defendant had shown no privity between himself and the trustees, he could not hold the land against the plaintiffs' title. The court charged the jury, for the defendant, that, unless the deeds of trust had been satisfied by entry of record, or payment, the title was in the trustees, and the plaintiffs could not recover ; and that if Mr. and Mrs. Meadows executed the deeds to secure the notes, and subsequently he having been adjudicated a bankrupt returned the land as his assets, and it was sold by the assignee, and the proceeds applied to the satisfaction of the deeds of trust, with the full knowledge of Mrs. Meadows, who made no objection thereto, she and her vendees were estopped to assert her title.

*Jenkins & Little*, for the plaintiffs in error.

1. When the debts which the deeds of trust were given to secure were barred, the deeds were barred also. Code 1871, § 2150. Mrs. Meadows's deed conveyed to the plaintiffs a title good against all persons except the trustees after condition broken and sale. If the defendant showed no privity between himself and the trustees, he, of course, must yield to the plaintiffs' title. *Morgan v. Hazlehurst Lodge*, 53 Miss. 665.

2. Mrs. Meadows, who was no party to the bankruptcy proceedings, was not estopped by her silence at McCaskill's sale, which conveyed no greater estate than the bankrupt had. *Lipscomb v. Postell*, 38 Miss. 476 ; *Englehard v. Sutton*, 7 How. 99 ; *Clement v. Hawkins*, 8 S. & M. 339. The trust-deeds bound only the income. Code 1871, § 1778 ; *Klein v. McNamara*, 54 Miss. 90 ; *Hand v. Winn*, 52 Miss. 784 ; *Dibrell v. Carlisle*, 48 Miss. 691 ; *Viser v. Scruggs*, 49 Miss. 705. Her silence, to estop her, must have been fraudulent, Bigelow on Estoppel, 486, 488 ; and she was not estopped by the sale of her property as that of her husband. *Palmer v. Cross*, 1 S. & M. 48. Her title was indisputable ; the world had notice of it, and she did nothing to induce the purchaser to buy. *Sulphine v. Dunbar*, 55 Miss. 255 ; *Staton v. Bryant*, 55 Miss. 261.

8. It was not necessary that the deeds of trust should be

marked satisfied on the record to enable the owner to recover possession. *Griffin v. Lovell*, 42 Miss. 402; Code 1871, § 2297; Acts 1876, p. 262. The plaintiffs' title could only be defeated by the defendant showing a title in himself, or other parties with whom he had connection. *Griffin v. Sheffield*, 38 Miss. 359. So far as the testimony showed, the defendant was a mere intruder. *Lum v. Reed*, 53 Miss. 73; *Kerr v. Farish*, 52 Miss. 101; *Hicks v. Steigleman*, 49 Miss. 377. The sale was a nullity, and conveyed no title; and the notes and trust-deeds were barred by the Statute of Limitations before the commencement of this suit.

*John D. Freeman*, on the same side.

1. A deed of trust is only a lien on the land, and does not convey the fee. The notes are barred; and there has been no sale under either trust-deed. The plaintiffs were therefore entitled to recover. The defendant failed to prove the deed conveying the land to him, and to show any connection between himself and the trustees. The bankruptcy sale was void so far as the trustees and Mrs. Meadows were concerned, they not being parties to that proceeding.

No counsel for the defendant in error.

CAMPBELL, J., delivered the opinion of the court.

In *Griffin v. Sheffield*, 38 Miss. 359, it was held that a recovery by the plaintiff in ejectment could not be defeated by showing that the defendant had acquired an outstanding title, which was barred by the Statute of Limitations, at the time of such acquisition. In *Heard v. Baird*, 40 Miss. 793, it was decided that the estate of the mortgagor or the grantor in a deed of trust which was extinct by lapse of time, was not such a legal estate as would support an action of ejectment, because a legal title is necessary to maintain ejectment; and it was said that the deed of trust had the effect to divest the grantor of his legal title, and if it had not been vested in him before the institution of the suit, no matter how long a period had elapsed, he could not maintain ejectment. We cannot sanction this view.

It is undeniable that the plaintiff must have the legal, as contradistinguished from an equitable title, in order to main-

tain ejectment ; but, by the statute, Code 1871, § 2295, copied from the Code of 1857, p. 808, art. 12 : " Before a sale under a mortgage, or deed of trust, the mortgagor or grantor shall be deemed the owner of the legal title, . . . except as against the mortgagee and his assigns, or the trustee, after breach of the condition of such mortgage or deed of trust." The plain meaning of which is that, until foreclosure of the mortgage or deed of trust, the mortgagor or grantor shall be considered the owner of the legal title, unaffected by the mortgage or deed of trust as against all the world, except that, after breach of the condition, the mortgagee or trustee shall have the legal title for the purposes of the trust. This statute adopted the doctrine of courts of chancery, that a mortgage or deed of trust, though in form a conveyance of the legal title, is but an incumbrance, — a mere security for a debt, — and that the mortgagor or grantor remains the real owner ; but that the mortgagee or trustee, after condition broken, is so far the owner as to be entitled to make the security available, according to its tenor. *Carpenter v. Bowen*, 42 Miss. 28 ; *Buckley v. Daley*, 45 Miss. 338. It is not the effect of the statute cited to make the mortgagee or grantee the legal owner, after breach of the condition, except so far as is necessary to make the security available. He may assert title for that purpose ; but he has no beneficial ownership. He may maintain ejectment, but only as a means to the end of enforcing the security. He may sell, in pursuance of a power in the instrument, but he has no title which is vendible under execution against him. *Buckley v. Daley*, *ubi supra*.

The cases cited in the opinion in *Heard v. Baird* were decided before the Code of 1857, under the operation of the then prevalent doctrine in some courts of law, that a mortgage or deed of trust divested the legal title of the mortgagor or grantor, according to the form of the instrument. The court, in the case cited, did not correctly apprehend and state the effect of the statute quoted. Under it the mortgagor, or grantor in a deed of trust, is to be considered the owner of the legal title, until a sale under the instrument, as if he had not executed it, subject only to the right of the mortgagee or his assigns, or the trustee, after breach of

the condition ; but even after condition broken, until a sale by virtue of the instrument, as to all others, except the mortgagee or his assigns, or the trustee, the mortgagor or grantor is to be considered the owner of the legal title, unaffected by the incumbrance. If the condition is never broken, the mortgagor or grantor remains the legal owner against all persons. If, after condition broken, payment shall be made of the debt secured, the incumbrance is thereby extinguished, and the right of the mortgagee or trustee to enforce the security is gone. If the debt is barred by the Statute of Limitations, all remedy, at law or in equity, on the mortgage or deed of trust is gone. Code 1871, § 2150. And it seems absurd to say that a plaintiff shall be hindered from recovering in ejectment because of an incumbrance executed by him which, from any cause, has become inoperative for want of any remedy upon it. If a man divests himself of his legal title, no matter how long a time elapses afterwards, he cannot recover in ejectment. In such case time is not important. Fifty years will be no more effective to invest him with title than will one year. But the vice of the argument in *Heard v. Baird* is in assuming that the mortgagor or grantor in a deed of trust parts with the legal title. By the form of the deed he does ; but the statute declares that he shall still be deemed the owner of the legal title until, etc., and except, etc. Having merely incumbered his legal title, when the incumbrance is removed, his legal title is as if the incumbrance had never existed. We regard the doctrine announced in *Griffin v. Sheffield*, as stated above, as correct, and hold that an outstanding title, to defeat the plaintiffs' recovery in ejectment, must be one capable of enforcement.

In *Stadeker v. Jones*, 52 Miss. 729, we held that payment of the debt secured by a deed of trust on personal property had the effect to extinguish the security, and to revest the title in the grantor as if the deed had not existed. We did not discuss the question as applicable to real estate, but recognizing the existence of *Heard v. Baird*, and other cases, distinguished from them the case before us. The investigation of the question in the case now under consideration has brought us to the conclusion above announced.

But aside from the fact that the Statute of Limitations has extinguished the deeds of trust, it results, from the foregoing view of a deed of trust, that the title remained in the grantor, as against all persons, except the trustee, after condition broken ; and no one but the trustee, or those claiming title under him, could set that title up to defeat a recovery on the title of the grantor, who is to be deemed the owner of the legal title, except as against the trustee.

It follows, from these views, that the action of the court below, upon the instructions, was erroneous. The title was in Mrs. Meadows, under whom the plaintiffs claim. The defendant claims derivatively under Mr. Meadows. He has never acquired the title of Mrs. Meadows. He cannot defeat the plaintiffs, who have acquired the title of Mrs. Meadows, by producing deeds of trusts executed by her so long ago that the debts secured and all remedy on the deeds of trust are barred by the Statute of Limitations. There has not been a sale of the title of Mrs. Meadows under the deed of trust. The statute made her the owner of the legal title, notwithstanding the deed of trust, except as against the trustee, after condition broken ; and now, even his title is extinct by lapse of time, and it cannot avail against the plaintiffs, because it is not a valid, subsisting, and operative title, and because the defendant has not the title of the trustee, if it was operative. There was no estoppel against Mrs. Meadows. *Sulphine v. Dunbar*, 55 Miss. 255 ; *Staton v. Bryant*, 55 Miss. 261.

*Judgment reversed, and new trial granted.*

**CASES ARGUED AND DECIDED**  
 IN THE  
**SUPREME COURT OF MISSISSIPPI**  
 AT THE  
**OCTOBER TERM, 1879.**

57	73
74	482
57	73
479	801

**ALFRED JOHNSON v. THOMAS J. FUTCH.**

1. **COUNTY TAX.** *Levy. Board of supervisors. Place of meeting.*  
 The levy of the taxes of Hinds County for the year 1875 was void, because not made at a place where the board of supervisors was authorized by law to hold its sessions.
2. **SAME.** *Ejectment. Void tax deed. Color of title.*  
 A deed from the State, based on a sale for the taxes so levied, is void ; and, to recover the land, the vendee of the former owner thereof, for whose taxes it was sold, is not compelled to trace title independently of a common source.
3. **EJECTMENT** *Mesne profits. Partial improvements.*  
 In ejectment for a tract of land, only a portion of which the defendant has improved, the jury, in assessing mesne profits and the value of improvements, may deal with the entire tract together, although the defendant claims the improved part under a separate conveyance.
4. **SAME.** *Value of improvements. How assessed.*  
 The value of improvements should be assessed on a basis coextensive in time with the estimate of rents and profits which they contributed to produce, so as to allow the defendant for all his improvements of which the plaintiff recovers the benefit.
5. **LANDLORD AND TENANT.** *Lease from stranger. Payment of rent.*  
 A lessee from the vendor of land does not, by paying the rent to the vendor, relieve himself from liability therefor to the vendee.

**ERROR to the Circuit Court of Hinds County.**

**Hon. S. S. CALHOON, Judge.**

In this ejectment by Thomas J. Futch for two hundred and forty acres of land and mesne profits, the defendant pleaded

"not guilty," with a claim for improvements on eighty acres of the land. The question of title was submitted to the court, which found for the plaintiff. The counter-claims for mesne profits and improvements were submitted to a jury, which assessed the former at five hundred, and the latter at five hundred and thirty dollars. The plaintiff, in open court, tendered the thirty dollars balance to the defendant, who declined to receive it, and the court gave judgment in the plaintiff's favor for possession of the land.

On the trial of the title, the plaintiff introduced a deed of trust by John A. Glover, recorded Aug. 17, 1872, with proof of a sale of the land thereunder, and the trustee's deed to himself. To show title from a common source, he then put in evidence a deed, dated Nov. 16, 1873, from John A. Glover to the defendant, conveying the eighty acres on which the latter made the improvements; proved that Glover had in 1875, 1876, and 1877, leased to the defendant the remaining one hundred and sixty acres; and rested his case. The defendant introduced a deed from the State to himself based on a sale for taxes in 1876 conveying the one hundred and sixty acres, and, it being admitted that the tax sales of lands in 1876 were made on proper days, introduced an abstract from the list of sales of lands in 1876 for non-payment of the taxes of 1875, which contained nothing but a description of this land, with the statement that it was redeemed, Nov. 16, 1877, by Alfred Johnson. The defendant then rested. The plaintiff introduced the order of the board of supervisors of Hinds County levying county taxes for the year 1875, which showed on its face that it was made at a regular meeting of the board held in Robinson & Steven's new building in the city of Jackson.

On the jury trial, the plaintiff proved that John A. Glover rented to the defendant ninety acres, being as much as he could cultivate of the larger tract of land, with the privilege of using the remainder, which was woodland; and that the defendant improved the tract of eighty acres, which was wild when he purchased from Glover, by clearing and fencing it, and erected a dwelling and other buildings thereon. The plaintiff then proposed to prove the rental value of the eighty acres with the improvements, to which the defendant objected,



contending that it should be without the improvements which the defendant, while holding as owner, put upon the land. But the evidence, which was to the effect that the land was worth nine dollars per annum with the improvements, and four dollars without them, was admitted, and the plaintiff rested. The defendant then offered to prove the cost of the improvements, when the court, on the plaintiff's objection, ruled that the question was, what was the value of the improvements at the time of the trial, and not their value at the commencement of the suit, nor their cost when made. The defendant also offered to show that he had paid John A. Glover rent for the hundred and sixty acres, from March 16, 1875, the date of the trustee's sale, to the trial, which was excluded by the court. After proving that he had improved the eighty acres, supposing it his land, without notice of an adverse claim, and introducing evidence tending to show that the rental value thereof was increased five dollars per acre by the improvements, which cost two thousand dollars, but were now, owing to use and decay, casual destruction and the general depreciation of property, worth only six hundred dollars, the defendant rested his case.

The court instructed the jury, for the plaintiff, to estimate the rental value of the eighty acres of land from March 16, 1875, to the date of the trial, with the improvements as they existed during that period, and the rental value of so much of the remaining land as the defendant leased from Glover for each year of the same period, and to assess the actual cash value, at the time of the trial, of such valuable and permanent improvements as the evidence showed were then on said land; that, in estimating the value of the improvements, they were confined to their present actual cash value, and were not to consider what they might have cost the defendant, or have been worth, when he put them upon the land. The court also refused to instruct the jury for the defendant to assess separately the rents of the eighty acres and of the one hundred and sixty acres, and have their verdict so to show.

*M. Dabney*, for the plaintiff in error, argued the case orally and in writing.

1. The title to the eighty acres of land is conceded to the

defendant in error, but the result in the lower court was wrong as to the improvements and rents. With respect to the title to the one hundred and sixty acres, however, a contest arises regarding the conveyance to Johnson from the State. Johnson was not tenant to Futch, and could therefore purchase and set up an outstanding title against him. *Wildy v. Doe*, 26 Miss. 35; *Bettison v. Budd*, 17 Ark. 546; *Ferguson v. Etter*, 21 Ark. 160; *Curtis v. Smith*, 42 Iowa, 665. There is no common source as to the larger tract, and the tax deed, even if void, is color of title, which, being admitted in evidence, was sufficient to put Futch on proof of his title from the government. *Moore v. Lord*, 50 Miss. 229; *Lum v. Reed*, 53 Miss. 73.

2. The law, by virtue of which improvements can be claimed on the trial in ejectment, Code 1871, § 1557, which also provides for the plaintiff's recovery of mesne profits, directs that the notice filed with the plea shall state the "character of the improvements and the value thereof." Value when? If the value of the improvements is to be estimated as of the date of the trial, the rent should be assessed for the several years on the basis that the improvements were, during those years, in the condition in which they are when the trial takes place. It has been held that the rent should be assessed on the land without improvements. *Neale v. Hagthorp*, 3 Bland, 551; *Moore v. Cable*, 1 Johns. Ch. 385. The value of the improvements should have been estimated at least as of the time for which the rent was assessed. The improvements have depreciated by use, and it is fallacious to say that the defendant had the benefit of them, because the annual rental value of the land is based upon the improvements as they were during the several years.

3. The parcels of land sued for were separate and distinct. Improvements were claimed on the smaller tract only, and the lien in favor of the defendant for the excess of the improvements over the rents should have been on that land. Code 1871, § 1557. Johnson should have been allowed to pay the rent found due on the smaller parcel of land, and to take it for his improvements, while he abandoned the larger tract. The two bodies of land were held by different titles, and derived from distinct sources, and the rents of one parcel should not

have been applied to pay for the improvements on the other.

4. If Glover had sued Johnson for the rent before this suit was instituted, the latter could not have set up the defence that Futch had a better title. *Wolf v. Johnson*, 30 Miss. 518. Johnson was discharged by payment of the rent on the larger tract to Glover, if the latter was Futch's tenant, and should have been permitted to prove that he had paid; or he should not have been held to be a tenant of Glover, and, through him, of Futch, and therefore incompetent to buy a tax title. Yet evidence that Johnson paid the rent to Glover was excluded, while it was held that he was Glover's tenant, in order to get rid of the conveyance from the State.

*S. M. Shelton*, for the defendant in error, made an oral argument and filed a brief.

1. The tax deed is not such color of title as to put Futch on proof of his title from the government. The large parcel of land was purchased by the State as Glover's, and sold by the State to Johnson, who is thus estopped to deny Glover's title. Both parties to this suit, therefore, claim through a common source. But Johnson's tax title is void, because the board of supervisors levied the tax for which the land was sold when not a legal body, because not in session at the county town where the law directed them to meet. Moreover, when the defendant purchased from the State, he was Glover's tenant. He never surrendered possession to Glover, whose title Futch acquired at the sale under the deed of trust. The fact that Glover rented to him after the trust sale makes no difference, because Glover after the sale was nothing more than Futch's tenant at sufferance. Such a tenant cannot set up an outstanding title. *Doe v. Parker*, 3 S. & M. 114; *Smith v. Otley*, 26 Miss. 291.

2. The defendant was entitled to the present value of the improvements, not the cost of putting them on the land; and the plaintiff was entitled to compensation for the use of the land during the time that the defendant held it, including the improvements. To permit the defendant to use the improvements until he has worn them out, and then get first cost for them, would be unjust. The intent of the statute is to charge

the plaintiff with the enhanced value of his land, caused by the defendant's labor and expenditures. Under the statute, the defendant pleads "the value" not the cost, of the improvements, and the jury assess their "actual cash value." Code 1871, § 1557. The court below adopted the only equitable mode of adjusting the counter-claims for mesne profits and improvements.

3. The only object in endeavoring to have the rents of the two parcels of land separately assessed was to enable the plaintiff in error to pay for the improved land, and to compel Futch to take that which was unimproved. This was merely asking of the court a favor; and, as the plaintiff in error shows no authority for the proceeding, it is useless to argue the question. The action is for a contiguous tract of two hundred and forty acres of land, and the fact that the defendant claims different parts under separate titles cannot alter the general rule.

4. The court rightly excluded the evidence of payment of rent to Glover. The plaintiff in error, having entered under Glover, by accepting a lease from him, and never having surrendered possession, could not deny his title so as to put Futch on proof thereof. But, in a controversy about rents, he could not, as against Futch, who had bought Glover's title, insist upon the tax title to prevent a recovery by Futch any more than Glover himself could. As Futch owned the land when Johnson rented from Glover, he has the right to recover the rent, notwithstanding Johnson had paid it to Glover, to whom he must look for reimbursement.

CAMPBELL, J., delivered the opinion of the court.

There is no error in the decision of the Circuit Court on the question of title to the land. The defendant below claimed under the same person from whom the plaintiff derived his title, and the plaintiff showed the better right. Indeed, the defendant showed none at all as against the plaintiff. True, he sought to show title derived from the State, which purchased the land when sold in 1876 for taxes accrued for the fiscal year 1875; but this deed conferred no title, both because it is not shown that the State purchased it, and because, if it

did, it acquired no title, as the levy of county taxes by the board of supervisors of Hinds County in 1875 was void, because not made by the board in session at the court-house of the county or other place at which it was authorized by law to hold its sessions. It is contended that though the deed be void, as seems to be conceded by counsel, it had the effect to compel the plaintiff to deraign title independently of the common source relied on by him, and which was sufficient, it is said, until it appeared that the defendant claimed from the State under the deed mentioned. The proposition is, that, although the deed conferred no title, it made color of title, and, therefore, the plaintiff was required to show title as against the world and recover on the strength of his title. This position is untenable. The plaintiff showed a right to recover as against the defendant. The defendant sought to defeat this right by connecting himself with a paramount outstanding title; but his effort failed, because the alleged outstanding title was shown to be nothing. It was not title. It was as harmless as if it had not existed. It is not a question of *color* of title, which is in some cases of great value, but it is a question of *title*, and, the deed from the State passing no title and the State having none, an outstanding title was not shown.

It was not erroneous to refuse to require the jury to deal with the eighty acres and the one hundred and sixty acres separately, in assessing mesne profits and damages, and the value of improvements. It would have been a mere favor to the defendant, at the expense of the plaintiff, which the court properly refused. While it might in some circumstances operate advantageously to a defendant, it might be highly injurious to the plaintiff, and there is no authority for it in the law, which fixes the rights of the parties. Without further noticing the several grounds of error assigned, we proceed to consider the important practical question involved in the instructions given to the jury.

The court instructed the jury, in substance, that the plaintiff was entitled to rent of the land from year to year, as it was improved, during those years, and that the defendant was entitled to pay for his improvements at their cash value, at the time of trial, without any estimate of what they were worth at

a former time for which the plaintiff recovered rent. This rule denies to an occupant entitled to pay for all valuable improvements, of a permanent character and not ornamental, their value as constituting a factor in creating or enhancing the rent received by the successful owner in an action of ejectment. It allows the owner of the land rent wholly caused or increased by the improvements of the *bona fide* occupant, and denies to the occupant the benefit of his improvements which in whole or part produced such rent. This is not justice as between the parties, and is not what the statute, Code 1871, § 1557, was intended to effect. Before the statute, the courts held that trespass for mesne profits was an equitable action, and, to do equity between the parties, the plaintiff was entitled to rents, and increased damages, beyond the rents, where circumstances made it proper and necessary, in order to make the plaintiff whole; and the defendant who, in good faith, had made improvements of a permanent character, and beneficial to the owner, was allowed to set off against the demand for rents and profits the value of such improvements; the principle being that the owner of the land should get his land, with its improvements, and pay for its use and occupation, and compensation for any special injury beyond this, but that, to the extent of the mesne profits and damages accrued, he should pay the defendant the value of his improvements, which were beneficial to the owner in the enhancement of the value of his land, and which had enhanced its value, in the past, in the matter of rent. The statute aims to effect justice by preserving the right of the owner as it existed before, and by enlarging the right of the defendant, by giving him the right to assert his claim to pay for the value of his improvements, as against the mesne profits and damages, and against the land, if the value of the former is greater than the latter. Without the statute, the right of the defendant was to set off his claim for improvements against the mesne profits, and, if the value of the improvements exceeded the mesne profits, the defendant was without redress. The principle of the statute is the same as the rule of the courts; but the statute is more favorable to the defendant, in securing him pay for the value of *all* his improvements of the character and under the circum-

stances mentioned by the statute, by setting it off against mesne profits and damages, and if it exceeds those, by making it a charge on the land. The statute is silent as to the time with reference to which the value of the improvements is to be estimated. The estimate, of course, is to be made at the trial, but with reference to what time shall it be made? It must be so made as to allow the defendant pay for *all* his improvements of the character designated. That is what the statute gives him, "the value of all permanent valuable and not ornamental improvements." How shall this right be made available to him? The value of the improvements, as formerly existing, may have greatly declined. Time with its destroying agency may have consumed valuable improvements in the production of rents and profits, which are awarded to the plaintiff. The improvements may have produced or increased the rents and profits, and sustained their decline in value as existing at the trial, in such production or increase. If the plaintiff recovers his land, and rents and profits thus produced or enhanced, he thus recovers the improvements as they were during the time the mesne profits accrued, and he should not have the improvements or the benefit of them without paying for them. Improvements which contributed to swell the demand of the plaintiff as allowed should be paid for; otherwise the defendant is not allowed the value of *all* his improvements, and the plaintiff obtains them without making compensation for them. The statute intends that the plaintiff shall have the improvements, but shall pay for them. If he recovers the land, with the improvements existing visibly on it at the time of recovery, his obligation to pay their value is not disputed. If he has been awarded mesne profits and damages produced by the improvements which have passed away in their production, in whole or in part, he recovers these improvements or their value in this shape — transmuted into money. Justice requires that the claim for improvements shall be coextensive in time with the allowance of rents and profits which they contributed to produce. The plaintiff shall have rent, and, if circumstances render it proper and necessary to make him whole, he is entitled to damages for waste or special injury beyond the measure of rents; and the

defendant is entitled to the value of all the improvements described in the statute, no matter when they were made, so as thereby to compensate him for improvements which inure to the advantage of the plaintiff, whether by adding to the value of the land when recovered, or, retrospectively, by augmenting the amount of his recovery of mesne profits. This is justice between the owner and *bona fide* occupant, and that is what the statute was intended to effect.

The object is to deny to the successful plaintiff the rents which arise from improvements not paid for, and to secure to the defendant, who loses land and improvements, pay for the value of the improvements, to the full extent that they are recovered by the plaintiff, whatever is the shape in which he receives them. This is the rule in Chancery Courts. *Tatum v. McLellan*, 56 Miss. 352; *Neale v. Hagthorp*, 3 Bland, 551, 591. If the improvement does not inure to the benefit of the plaintiff, justice is done by denying the defendant the value of it; and, if the defendant can get no pay for an improvement, the plaintiff should not be allowed any rent, by reason of such improvement. *Nixon v. Porter*, 38 Miss. 401; In *Miller v. Ingram*, 56 Miss. 510, it was said, "The successful plaintiff is to have the land and improvements, but is to pay for the latter." In this opinion, we have shown how the owner is to pay for improvements. He must pay for them in a diminution of his demand for mesne profits to the extent that they arose from the improvements, or by an estimate of the value of the improvements as of the period when they contributed to the production of the mesne profits.

The court ruled correctly in holding that the defendant below was not protected by his payment of rent to Glover. It was his folly and misfortune to rent the plaintiff's land from Glover, and paying Glover the rent for the plaintiff's land did not affect his liability for it to the plaintiff. We find no error in the several rulings of the court, except in the denial to the defendant below of the right to have the value of *all* his valuable improvements considered as of the time when they contributed to the advantage of the successful plaintiff; but for that error the judgment will be reversed, and the cause remanded for a new trial in accordance with this opinion.

*Judgment accordingly.*



## THOMAS W. SIMS ET AL. v. W. F. EILAND ET AL.

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561. DECEIT. *False recommendation. Scienter.*

An action for deceit in writing a false statement concerning another, whereby the latter obtained credit, cannot be maintained unless the defendant made the misrepresentation knowingly.

2. PLEADING. *Argumentativeness. Acts 1878, p. 190.*

Under our system, argumentativeness in a pleading is no ground of demurrer.

ERROR to the Circuit Court of Noxubee County.

Hon. JAMES M. ARNOLD, Judge.

The declaration in this action on the case for deceit, filed by Thomas W. Sims and others, in their firm name of Sims, Harrison, & Co., of Mobile, Alabama, against W. F. Eiland, C. C. Eiland, and A. H. Bush, of Macon, Mississippi, alleged that although James Kincannon, who was a stranger to the plaintiffs, but the familiar acquaintance of the defendants, was insolvent and unworthy of credit, yet the defendants gave him a letter signed by them, and directed to the plaintiffs, stating that it would be handed to the latter by the defendants' old friend, James Kincannon, who would visit Mobile on business, which he would explain to them, that he had been long and favorably known to the defendants, and it gave them pleasure to say that any statements which he made to the plaintiffs could be implicitly relied on, and that any favors which the plaintiffs showed him would be thankfully received both by him and the defendants; that Kincannon presented the letter to the plaintiffs, who advanced him on the faith thereof nine hundred dollars; that he had not repaid the advance, but that the plaintiffs had obtained judgment therefor against him, and the execution had been returned *nulla bona*, and that they therefore claimed damages from the defendants on account of the false statements in the letter.

On the overruling of the plaintiffs' demurrer to the defendants' second plea, which is set out in the opinion of the court, the replication described in the opinion was filed. The de-

fendants' demurrer thereto was sustained, and the plaintiffs declined to plead further, but from a judgment *nil capiat* brought up the case.

*Rives & Rives*, for the plaintiffs in error.

1. It is difficult to so construe Code 1871, § 611 with Acts 1878, p. 190, as to sustain a demurrer in any case, unless something so essential to the action or defence has been omitted that judgment according to law and right cannot be given. The Code seems to abolish general demurrers, and the act of 1878 special demurrers. The court below ignored the latter statute, to which no objection is made, because the law of the case should be settled, as far as practicable, on the pleadings. Special attention is called to the replication and demurrer thereto, as raising directly the decisive issue.

2. While it is true that the false representation must have been made with the intent of obtaining credit for Kincannon, it is also true that such intent need not be actual. It is sufficient if it is apparent, for a man may always act on the ostensible purpose of another. The ruling of the court below on the pleadings was in effect that the defendants were not bound by a reasonable construction of their language, but could prove a private intent never communicated to the plaintiffs. The statements in the letter caused the plaintiffs to act; and the defendants cannot now by verbal proof give them a different meaning. *Ainslie v. Medlycott*, 9 Ves. 18; *Lobdell v. Baker*, 1 Met. 193, 201; *Stone v. Denny*, 4 Met. 151; *Smith v. Richards*, 13 Peters, 26; *Clopton v. Cozart*, 13 S. & M. 363; *Parham v. Randolph*, 4 How. 435; *Davidson v. Moss*, 5 How. 673; *Hall v. Thompson*, 1 S. & M. 443; *Iasigi v. Brown*, 17 How. (U. S.) 183.

*John E. Madison*, on the same side.

*Jarnagin, Bogle & Jarnagin*, for the defendants in error.

CAMPBELL, J., delivered the opinion of the court.

The gist of this action is fraudulent misrepresentation, knowingly made by the defendants, whereby the plaintiffs, trusting to it, were damnified. To maintain the action, the defendants must have made a false statement knowing it to be false. *Clopton v. Cozart*, 13 S. & M. 363; *Taylor v. Frost*,

89 Miss. 328; *Pasley v. Freeman*, 2 Smith's Lead. Cas. 157. The second plea, which avers in substance that the defendants "honestly believed" their representation to be true when they made it, was a sufficient answer to the declaration, and the demurrer to it was properly overruled. The replication, that the defendants had no reasonable ground to believe that their representation was true when they made it, is an argumentative denial that they did believe it, for one cannot believe what he has no reasonable ground to believe. Formerly, argumentativeness was a ground of special demurrer, but now "no pleading shall be deemed insufficient for any defect which could heretofore be objected to only by special demurrer." Acts 1878, p. 190. The argumentativeness of the replication, therefore, does not constitute insufficiency, and the only question is, whether a replication traversing the plea is good. Clearly it is, for the plaintiffs having demurred ineffectually to the plea, were required to reply by traversing it, or confessing and avoiding it. They chose the former course, and inferentially denied the truth of the plea. The demurrer to the replication should have been overruled, and the issue joined by the traverse of the plea should have been tried. The judgment will be reversed, the demurrer to the replication overruled, and the cause remanded for further proceedings in accordance with this opinion.

*Judgment accordingly.*

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EX PARTE WILLIAM MEYER.

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86 600|

1. IMPRISONMENT FOR DEBT. *Costs of prosecution.*

Costs of criminal prosecutions are not debts within the meaning of that provision of the State Constitution (Const. art. 1, § 11) which prohibits imprisonment for debt; and the statute (Acts 1878, pp. 164, 169, § 12) which provides that convicts shall be held at labor until they pay them, is valid.

2. SAME. *Costs of the defence.*

The statute does not contemplate the detention of prisoners for the costs of their defence, but only for those of the prosecution.

APPEAL from the decision of Hon. E. G. Peyton, chancellor of the Ninth District of Mississippi, dismissing a writ of *habeas corpus*, and remanding the relator to custody.

*M. Green*, for the appellant.

The Constitution of Mississippi, art. 1, § 11, provides that there shall be no imprisonment for debt. The costs of a criminal prosecution are a debt within the provision, and are not part of the penalty. *State v. Kenny*, 1 Bailey (S. C.), 375; *State v. Sauvaine*, 14 Ind. 21; *Thompson v. State*, 16 Ind. 516. A pardon removes the penalty, *Jones v. Board of Registrars*, 56 Miss. 766; but cannot relieve from liability for the costs. *Edwards v. State*, 12 Ark. 122; *State v. Farley*, 8 Blackf. 229; *Hall's Case*, 5 Coke, 51; *Anglea v. Commonwealth*, 10 Gratt. 696; 2 Hawkins, P. C. 546; *Duncan v. Commonwealth*, 4 S. & R. 449. In *Ex parte Gregory*, 56 Miss. 164, this court held that, upon a pardon by the governor, the party could not be held for costs, on the ground that the judgment for costs is a debt, which may be collected, like other judgments, after the term of imprisonment has expired. There is, so far as the penalty is concerned, no difference between the pardon and the expiration of the sentence. The twelfth section of the act of 1878 is therefore unconstitutional.

*Shelton & Shelton*, for the appellee.

The constitutional provision relied on by the appellant was intended to apply to contract debts. It was directed against the old law whereby creditors confined their debtors, and was never designed to relieve from pecuniary liabilities and penalties arising from the commission of crimes. By Code 1871, § 2851, the costs of a prosecution are a debt, but the act of 1878 makes them also a part of the penalty. This court decided in *Ex parte Gregory*, 56 Miss. 164, that the governor's pardon could not relieve from the debt. But the vice of the argument for the appellant is in not distinguishing between the debt and the penalty. The fact that the prisoner, by serving a given time, has suffered part of the penalty for his crime, does not release him. The convict is not imprisoned because he owes the costs, but because he violated the law. That his labor is used as a means of paying the expenses of his conviction does not make it less a part of the

punishment. Legislative power to fix the punishment of crime is limited by Const. art. 1, § 8, alone. The Indiana decisions cited by opposing counsel have been overruled. *McCool v. State*, 23 Ind. 127; *Lower v. Wallick*, 25 Ind. 68. Where the penalty of an offence is a fine, it is the statutory law in most States that the convict may be imprisoned until it is paid. Code 1871, §§ 2811, 2839, would hardly be held unconstitutional. The Indiana cases sustain such laws; and a fine is as much a debt as the costs of the prosecution.

CHALMERS, J., delivered the opinion of the court.

The relator having served out the term of his imprisonment in the State penitentiary brings this writ of *habeas corpus* to regain his liberty, of which he alleges that he is illegally deprived by the superintendent of that institution. The superintendent answers that the relator has not paid the costs of prosecution adjudged against him at the time of his conviction, and that, therefore, he is detained in accordance with the twelfth section of "An Act to Reduce the Judiciary Expenses in this State," (Acts 1878, p. 164), until he shall by his labor, at an allowance of twenty-five cents per day, have liquidated said cost-bill which, as appears by the answer, amounts to fifty-nine dollars.

The relator contends that the twelfth section of said act, as well as all other parts of it which contemplate the detention of convicts in confinement until by their labor they shall have worked out the costs adjudged against them, is unconstitutional because in violation of the prohibition against imprisonment for debt. The sole question presented, therefore, is, whether costs adjudged against the defendant in a criminal prosecution are debts within the meaning of the constitutional provision. It is quite evident that the word "debt" in this connection is not used in its widest scope, as embracing every pecuniary liability or obligation which may by law be devolved upon the citizen, since it would in such a sense forbid imprisonment as a means of compelling the payment of fines, whether imposed for contempt of judicial process, or as a punishment for crime. Although such imprisonments are universal, it has never been supposed that they infringed at all upon the constitutional

provision in question. We think the debts which the framers of the Constitution had in view were those springing from the contracts of the party, express or implied, or the liabilities which the law imposes upon him for his tortious acts to another, and are wholly disconnected from the penalties incurred by violations of the criminal law. But if the provision affords no protection against a fine, how can it shield against the costs which the State is compelled to incur in effecting his conviction?

By his criminal act, the convict has at once subjected himself to the imposition of the penalty, and compelled the State to incur costs in having him adjudged guilty. If, in cases where the penalty is pecuniary in its character, the constitutional provision does not protect from imprisonment to make it effective, it is impossible to see how the costs incurred by the State in the prosecution stand upon any different footing. They are no more a debt due the State than the fine is, and all will agree that confinement, in order to compel payment of the latter, is not imprisonment for debt, but merely a punishment for crime in one of its most effective methods. The fine is imposed, not because the offender owes the State money, but as a punishment to him and a deterrent to others. The costs incurred by the State in bringing the criminal to justice may well be annexed to the punishment, as being consequent upon the crime, and essential to its development. *McCool v. State*, 23 Ind. 127; *Lower v. Wallick*, 25 Ind. 68.

It is insisted that this view conflicts with the utterances of this court in *Ex parte Gregory*, 56 Miss. 164, in which it was held that a pardoned convict could not be held in custody for the unpaid costs of the prosecution. That case arose previous to the act of 1878, by which it was for the first time enacted that the convict should be held until he worked out the costs,—the effect of which was to make the manual labor a part of the punishment. Whether, since that act, an executive pardon would not release from confinement and from labor, and leave the State and the officers of court to collect the costs as other judgments are collected, it is not now necessary to decide.

The statute does not contemplate that the convict shall be held for any portion of the costs incurred by himself in his

defence, either those due to the officers of court or to his own witnesses. It is only for the costs of the prosecution, that is to say, those incurred in issuing, executing, and obeying the process of the State, and the fees of the prosecuting attorney, that he is to be held to labor. It might indeed admit of serious question whether he could be held for his own costs, since these perhaps would be embraced within the word "debt" as used in the Constitution. It does not appear from the cost-bill filed with the respondent's answer whether the relator in this case is held for any of the costs incurred by himself in his defence or not. He will be entitled to his discharge when he shall have worked out those incurred by the prosecution.

*Judgment affirmed.*

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JOHN KELLY, TRUSTEE v. JAMES A. REID.

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88	364

1. CHATTEL MORTGAGE. *Description. Uncertainty.*

A chattel mortgage must contain such terms of description as will serve to distinguish the property embraced therein from all other property of the same kind.

2. SAME. *Ambiguity. Parol evidence to explain.*

A mortgage of "30 head of cattle, 3 horses, and 2 mules," is void for uncertainty; but if the animals were described as belonging to the grantor, who owned only that number of each class, *semble* that the mortgage would be valid, and the animals could be identified by parol evidence.

ERROR to the Circuit Court of Madison County.

Hon. S. S. CALHOON, Judge.

*John Handy*, for the plaintiff in error.

The evidence showed that the mortgagor owned, when the deed was made, the number named therein of each description of animals, and no others of the same kind. The execution of the mortgage was an assertion of ownership, and the presumption from giving it is that the property embraced belonged to the grantor. Its effect was the same as if it read "my 30 head of cattle, my 3 horses, and my 2 mules." The grantor is not to be assumed guilty of obtaining money

by mortgaging what did not belong to him. The construction for which the plaintiff in error contends is as natural and proper as that adopted in *Hazlip v. Noland*, 6 S. & M. 294, 302; *Dixon v. Cook*, 47 Miss. 220; and *Foute v. Fairman*, 48 Miss. 536; where the township and range in the description of land was supplied by parol. In *Bowers v. Andrews*, 52 Miss. 596, it is stated that a conveyance of "my residence" would be sufficient if the grantor owned but one. Whenever the description is applicable to more than one subject, extrinsic evidence is admissible to prove which was intended. 3 Phil. Evid. 747; *McChesney v. Wainwright*, 5 Ohio, 452; *Johns v. Church*, 12 Pick. 557. Where the description was "two horses belonging to him," it was held admissible to show that the grantor had but two and to identify them. *Brooks v. Aldrich*, 17 N. H. 443. A mortgage of "ten horses in the possession of the mortgagor" is good for the same reason, *Eddy v. Caldwell*, 7 Minn. 225; and so is one of "6 bales of cotton, now growing and being grown and produced on the plantation in Lee County, cultivated by myself, and known as the Jesse Tucker plantation." *Stephens v. Tucker*, 55 Ga. 543. While in *Blakely v. Patrick*, 67 N. C. 40, a mortgage of "ten new buggies" was defeated by showing that the mortgagor owned more than ten, in *Croswell v. Allis*, 25 Conn. 301, a mortgage of a specified number of different kinds of furniture was held valid as to those kinds of which all were conveyed, and void as to those kinds of which all were not conveyed. It is impossible to describe animals in such a way as to distinguish them from all others, without resorting to parol evidence, unless the deed be as long as a volume.

*R. B. Campbell*, for the defendant in error.

The description of the property is insufficient, and therefore the deed is void. It is said, in *Bowers v. Andrews*, 52 Miss. 596, that the descriptive words must contain such particularity in themselves as will guide to the property, or they must point to some extrinsic fact by means of which the requisite certainty is obtained. No words can be found that contain less particularity in themselves than those in the mortgage, and the closest scrutiny will fail to discover any fact that points to



something *aliunde* by which the property can be rendered certain.

GEORGE, C. J., delivered the opinion of the court.

The plaintiff in error is the trustee in a mortgage, in which the property attempted to be conveyed by it was described in these words: "The following described real and personal estate lying and being in the County of Madison and State of Mississippi, to wit: 30 head of cattle, 6 oxen, 3 horses, 2 mules, 3 wagons, 50 hogs, also all the crop of cotton, corn, fodder, and potatoes, and all other produce which may be raised on the O'Reilly place in said county." After this mortgage was recorded, the defendant in error recovered a judgment against the mortgagor, and levied his execution on the cattle, horses, and mules in his possession, and which are claimed to be embraced in the mortgage, and insisted that the mortgage is void as to this property, because of the insufficiency of the description. This view was sustained by the court below, and hence this writ of error.

While it is true that it is difficult, if not impossible, to describe in a mortgage this species of property, so as to determine with certainty whether any particular property of that class is that embraced in the mortgage, without resorting to evidence *aliunde*, yet the mortgage must mention some fact or circumstance connected with the property which will serve to distinguish it from all other property of the same kind. This fact or circumstance must be stated in the mortgage itself, it cannot be proved by parol evidence without thereby adding to the mortgage a term not contained in it. When thus stated, its existence in connection with the property may be established by extrinsic evidence. The object of a mortgage is to create a lien on certain specific property, and not to give a right to the delivery of any property whatever of the particular kind mentioned in it. The claim of the mortgagee is to have his lien enforced on the identical property mentioned in the mortgage, and if the description in that instrument be so vague and uncertain as necessarily to apply equally to all property of that kind, then it is clear that there can be no identification of it, without proving some fact or circumstance con-

nected with the property not referred to in the mortgage. Thus in this case, if the mortgagor had surrendered to the trustee any thirty head of cattle which were in Madison County at the date of the mortgage, the terms of that instrument, so far as that part of the property is concerned, would have been complied with. The trustee could not have objected that they were not the cattle owned at the time by the mortgagor, and to which it was intended that the lien should attach, because there is nothing in the description of the property in the mortgage to indicate that ownership was annexed to the property as a mark of identity.

The fact of the ownership or locality of the property, or some other mark, which, when proved to exist, would separate and distinguish it from other property, should have been mentioned in the mortgage. Thus if the mortgage had been written, "my stock of cattle, consisting of about 30 head; my 2 mules, and my 3 horses," &c., or "the stock of cattle on the O'Reilly place, consisting of 30 head," &c., it would have been sufficient, provided the stock of cattle and the mules and horses did not exceed the number stated; or if the mortgage indicated an intent to convey the whole stock or all the horses and mules without reference to the number. A proper mode to describe property of this sort, when all the property of that kind owned by the mortgagor, or all on a particular place, is intended to be conveyed, would be to say, "all my stock of cattle, consisting of about 30 head, and all my horses and mules, consisting of 2 head of the former and 3 head of the latter." When a precise number only is conveyed, and there is in fact a greater number, and no intention is manifested to include the whole, there would be a failure to identify the particular animals conveyed, and the deed would be void for want of a proper description. For these reasons, the description in the mortgage in controversy is held to be void.

It is proper for me to state that my own views, at first, were adverse to the conclusion here reached. It has been shown that, if the ownership of the property by the grantor had been stated in the mortgage, it would have been sufficient, as the proof is that he owned at the date of the mortgage the exact number of cattle, oxen, horses, and mules mentioned in it. It

occurred to me that as the whole object of the mortgage was to give a lien on property, and as it is impossible for a mortgagor to give a lien on property not his own, the mere giving of the mortgage must be understood as an assertion by the mortgagor of ownership in the property, and therefore that the mortgage ought to be construed as if this necessary implication were expressed in it, otherwise the whole transaction would be an unmeaning ceremony. But the convictions of my associates are so strong that this construction is unwarranted, that I am induced to believe that my first impressions were erroneous.

*Judgment affirmed.*

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HOUSTON BURRUS v. W. J. GORDON.

57	93
74	504
074	510

1. PAYMENT. *Sum less than debt.*

Payment of a less is not a good plea to a demand for a greater sum.

2. SET-OFF. *Action for damages.*

Set-off is not available in a suit for unliquidated damages.

3. ACCORD AND SATISFACTION. *The accord.*

To constitute accord and satisfaction an agreement is essential that the sum paid or act performed shall be accepted in satisfaction of the original demand.

4. SAME. *The satisfaction.*

Performance is essential to accord and satisfaction unless the promise was accepted in satisfaction.

5. COVENANT. *Plea of general performance.*

A plea of general performance is demurrable in an action of covenant in which specific breaches are assigned. *Emanuel v. Laughlin*, 3 S. & M. 342, cited.

ERROR to the Circuit Court of Yazoo County.

Hon. S. S. CALHOON, Judge.

*Robert Bowman*, for the plaintiff in error.

1. The demurrer to the eighth plea, which was general performance of covenants, should have been overruled. Chitty lays down the rule that where, as in this case, the covenants are in the affirmative and not in the negative or disjunctive, performance may be pleaded generally. 3 Chitty Pl. 985.

"In pleading the performance of conditions precedent, the plaintiff or defendant may aver generally that he duly performed all the conditions on his part." Code 1871, § 585.

2. The court erred in sustaining the demurrer to the plea of payment and set-off. Under the plea of payment the defendant can prove any partial payment or set-off, the nature whereof is shown in the account filed with his plea. Code 1871, §§ 603, 604. Set-off is a demand presented against another demand for the purpose of reducing its amount. *Waterman on Set-off* (2d ed.), 2. Although this action was on a covenant, yet the covenant was in effect no more than an agreement to pay so much money. The claim of the defendant was fixed, and there were no unliquidated damages on either side.

3. The rulings as to the settlement of the demand were also erroneous. If there was at any time a settlement in satisfaction, or to be in satisfaction, of the failure to perform the covenants, clearly the law was for the defendant. The evidence that it was agreed that, if the defendant would pay for the rails, his contract would be complied with was, by the refusal of that instruction, excluded from the consideration of the jury.

*Garnett Andrews*, for the defendant in error.

1. A plea of general performance to a declaration in covenant assigning specific breaches has always been held bad. 1 Chitty Pl. 487. The only possible replication to such a plea would be to reassign the breaches, to which the defendant might rejoin general performance and so on *ad infinitum*. The defendant's proper plea in this case is a denial of the breaches assigned. 1 Arch. Nisi Prius, 434; *Emanuel v. Laughlin*, 8 S. & M. 342; *Thompson v. Means*, 11 S. & M. 604. Neither 3 Chitty Pl. 985, nor Code 1871, § 585, referred to by the plaintiff in error, supports his position as to this plea.

2. The demurrer was properly sustained to the sixth plea. The damages sued for are essentially unliquidated, and a set-off cannot be pleaded to covenant for unliquidated damages. 1 Arch. Nisi Prius, 265, 445; *Whitaker v. Robinson*, 8 S. & M. 349; *Waterman on Set-off* (2d ed.), 198, 199, 333, 348.

3. The instruction which was designed to present the law of accord and satisfaction, was properly refused, because it failed

to state in all respects the rule, particularly as to the plaintiff's acceptance of the promise in satisfaction of his demand.

GEORGE, C. J., delivered the opinion of the court.

The defendant in error leased a tract of land to the plaintiff in error for the year 1876. The lease was by indenture signed and sealed by both parties. By its terms, Burrus was to pay a specified amount of cotton per acre as rent; to clear up six acres of land; to repair the fences by making them up to an agreed height; to leave on the place the seed of the cotton raised on it; and to surrender the premises in good repair on December 31, 1876. Gordon brought his action of covenant on this indenture, assigning, as specific breaches of the stipulations, the failure to deliver two hundred pounds of the cotton due as rent, the failure to leave the cotton seed on the place, and the neglect to clear the six acres of land, and to repair the fences; and claimed as damages, for these breaches of the covenants on the part of Burrus, the sum of \$500. To this the plaintiff in error interposed several pleas, to the sixth and eighth of which demurrers were sustained; and this action of the court below is here assigned as error. The sixth plea averred in substance that in April, 1877, and before the commencement of this suit, the defendant paid to the plaintiff \$76.80, in full satisfaction of all the damages sustained by him by reason of the breaches of the covenants mentioned in the declaration. To this plea was appended an account in favor of the defendant against the plaintiff, consisting of four items of alleged indebtedness of the plaintiff to the defendant, amounting to \$76.80, the amount stated in the plea. These items were not technical payments, but, if allowable at all, could be allowed only as set-off.

The sixth plea is inartificially drawn; and while it possesses some of the qualities of a plea of payment, and also some of the qualities of a plea of accord and satisfaction, it is yet not good as either. As a plea of payment it is bad, because it sets up a payment of \$76.80 in full satisfaction of a demand for \$500. As a plea of accord and satisfaction it is bad, because it fails to state any accord between the parties that the sum paid should be accepted in satisfaction of the plaintiff's larger

demand. The uncertainty of the nature of the plea is removed by an agreement of the defendant set out in the record, that it should be treated as a "plea of payment and set-off." We have already seen that it was bad as a plea of payment. It was also bad as a plea of set-off, conceding that such a plea is allowable in any case under our pleading act, because the action was for unliquidated damages, in part at least. *Whitaker v. Robinson*, 8 S. & M. 349; *Gordon v. Bowne*, 2 Johns. 150; *Montagu on Set-off*, 13, 17, 19. The demurrer was also properly sustained to the eighth plea, which was a plea of general performance to an action of covenant, in which specific breaches were assigned. *Emanuel v. Laughlin*, 3 S. & M. 342.

It is also assigned for error that the court refused to charge the jury as requested in the fifth charge preferred by the defendant. This charge was to the effect that though the jury believe that there was a failure of the defendant to keep all his covenants, "yet if at any time there was a settlement in satisfaction, or to be in satisfaction of such failure, then the law is for the defendant." The evidence on which this request for a charge was based, as given by the defendant as a witness in his own behalf, was that the agent of the plaintiff agreed with him that "if the defendant would pay for the splitting of two thousand rails his contract would be complied with, and that he agreed to do it." He admitted on cross-examination that he had never made the payment. The charge, when considered by itself, is obscure, and is objectionable in not explaining to the jury the nature of the settlement requisite as a defence to the action. When applied to the evidence, it appears to be still more objectionable, since it is not shown that the plaintiff's agent agreed to accept the simple promise of the defendant to pay for the rails as a satisfaction of the plaintiff's demand. To constitute a valid accord and satisfaction, the agreement or accord must be executed; there must be satisfaction as well as an accord. It is true that the satisfaction will be complete if the promise of the defendant be accepted as satisfaction, in lieu of actual performance. But the evidence did not sustain this view. See *Barnes v. Lloyd*, 1 How. 584; *Guion v. Doherty*, 43 Miss. 588. We perceive no error in the record.

*Judgment affirmed.*

## A. B. CARSON v. W. A. PERCY ET AL.

1. SPECIFIC PERFORMANCE. *Easement and servitude. Hardship.*

A grant, on valuable consideration, of the right perpetually to lay off new landings, as the river bank caves, to the exclusion of all others, on the water front of a large plantation, near a growing town, is not so unfair that equity will refuse to decree its specific performance.

2. SAME. *Ambiguity. Right of election.*

The stipulation is sufficiently definite if it provides that the covenantor shall permit the covenantee, when the landing caves, to fix another, not to exceed four acres, at any point on the river front of the plantation, where the public interest may demand.

3. SAME. *Vendees of covenantor. Chancery jurisdiction.*

The covenantee can maintain a bill in chancery to enforce the contract against vendees, with notice, of parts of such plantation, who have collected rents from a new wharf, and laid off other ground for landing purposes.

APPEAL from the Chancery Court of Washington County.

Hon. W. G. PHELPS, Chancellor.

The bill filed by A. B. Carson against W. A. Percy and others alleged the following facts: Benjamin Roach, owner of Batchelor's Bend plantation, adjoining the town of Greenville, conveyed to Carson the exclusive privilege of keeping a landing on the river front of the plantation, which was two miles long, and to that end also conveyed four acres of land on said front adjoining the town, then laid off and occupied by Roach as a landing. The terms of the covenant were, "that, if, by reason of the caving of the river bank, the land conveyed should become valueless, Roach was to suffer Carson to fix another landing, not to exceed four acres, at any point on the river front of the plantation where the public interest might demand, and to execute to him a suitable conveyance therefor, with a suitable road, not to exceed thirty feet in width, leading to the same; it being the intention of the parties that by payment of the sum of four thousand dollars Carson was to have a perpetual landing, and to have exclusive control of any landing on the river front of the plantation." The complainant went into possession and leased the landing to

Trigg & Gray. They sublet it to Archer, Nelson, & Co., who assigned to the Merchants' Wharfboat Association; and the latter attorned to the defendants.

Shortly after the sale to the complainant, Roach laid off on his plantation contiguous to the town, which was rapidly growing, the "Batchelor's Bend Addition" thereto, in front of which was the first landing. He then sold the plantation to Huntington & Levalley, excepting in the deed all ways, landings and streets, and gave actual notice of the terms of the complainant's deed. Huntington & Levalley subsequently conveyed to the defendants the lots in question, which were part of the "Batchelor's Bend Addition" aforesaid. The first landing caved, as did a second, laid off while Roach owned the plantation, and the ground now occupied was laid off by some of the mesne lessees as a third location. But it did not appear from the bill who owned the plantation when the present landing was laid off, and no conveyance was made of any but the first four acres. The defendants had both actual and constructive notice of the deed to the complainant, though the deed from Huntington & Levalley to them contained no exceptions as to the landing. The defendants have been collecting rents from the Merchants' Wharfboat Association and have laid off additional ground for landing purposes. The prayer of the bill was for specific performance and an account of the rents.

The defendants demurred to the bill because the covenants did not bind them, and because the Chancery Court had no jurisdiction; and, also, on the grounds that the deed to the complainant was void for uncertainty, and the contract too unconscionable for the court to order its specific performance. The Chancellor overruled the first two points, but sustained the demurrer on the latter grounds, leaving the complainant to his remedy at law against the covenantor, from which decree the appeal was taken.

*Nugent & McWillie*, for the appellant.

1. The case is one in which a court of chancery has concurrent jurisdiction. 1 Story Eq. Jur. §§ 508, 684, 686, 687. If the tenants were sued, they would justify their possession under the supposed paramount claim of the defendants, to



which they yielded, and the appellant could not proceed without making the latter parties. The defendants are bound to account and pay the rents collusively collected by them. It is manifest that, under the circumstances of this case, the appellant's remedy at law is not unembarrassed; equity is the only tribunal which can grant complete and speedy relief.

2. The covenant bound the assignees of Roach. Code 1857, pp. 306, 309, 485; *Pass v. McRea*, 36 Miss. 143; Washburn on Easements and Servitudes, 4, 6, 9; *Laumier v. Francis*, 23 Mo. 181; *Ritger v. Parker*, 8 Cush. 145; 4 Kent Com. 471; *Colby v. Osgood*, 29 Barb. 339; *Hopkins v. Lane*, 9 Yerger, 79; *Lawrence v. Senter*, 4 Sneed, 52; *Hurd v. Curtis*, 19 Pick. 459; 2 Wash. Real Prop. 263; *Kingdon v. Nottle*, 4 M. & S. 53; *Bally v. Wells*, 3 Wils. 25; *Morse v. Aldrich*, 19 Pick. 449; *Allen v. Culver*, 3 Denio, 284; *Woodruff v. Trenton Water Power Co.*, 2 Stock. Ch. 489; *Masury v. Southworth*, 9 Ohio St. 340; *Shelton v. Codman*, 3 Cush. 318. There can be no doubt of the appellees' privity in estate, for they were the holders, derivatively, of Roach's title. 4 Kent Com. 109; 1 Greenl. Evid. §§ 28, 189, 190, 211, *Stacy v. Thrasher*, 6 How. (U. S.) 44; *Carver v. Jackson*, 4 Peters, 1; *Norman v. Wells*, 17 Wend. 186; *Vyvyan v. Arthur*, 1 B. & C. 410. The following authorities show the effect of the notice to them, alleged in the bill, in connection with this point: *Tulk v. Moxhay*, 2 Phil. 774; *Hills v. Miller*, 3 Paige, 254; *Barrow v. Richard*, 8 Paige, 351; *Brouwer v. Jones*, 23 Barb. 158; *Gibbert v. Peteler*, 38 Barb. 488; *Scott v. Burton*, 2 Ashmead, 312; *Champion v. Brown*, 6 Johns. Ch. 398; Washburn on Easements and Servitudes, 508, 509; 1 Story Eq. Jur. §§ 741, 742, 750, 751, 784, 788.

3. The contract was certain, free from hardship, and in all respects such that equity should decree its specific performance. 1 Story Eq. Jur. §§ 742, 747, 751, 756; *Foss v. Haynes*, 81 Maine, 81; *Colson v. Thompson*, 2 Wheat. 336; *Cathcart v. Robinson*, 5 Peters, 264; *Seymour v. Delancy*, 3 Cowen, 445; Fry on Specific Performance, §§ 229, 251, 252; *Boucher v. Vanbuskirk*, 2 A. K. Marsh. 345; *Prater v. Miller*, 3 Hawks, 628; *Andrews v. Andrews*, 28 Ala. 432; *Bromley v. Jefferies*, 2 Vern. 415; *Butler v. Every*, 1 Ves. Jr. 136;

*Wiswall v. McGowan*, Hoff. Ch. 125; *Clinton v. Hooper*, 3 Bro. Ch. 201; *Mosely v. Virgin*, 3 Ves. Jr. 184. The appellant could and did exercise the right of election in fixing the place at which he could enjoy his easement. *McComb v. Gilkey*, 29 Miss. 146; *Williamson v. Johnston*, 4 Monroe, 253; *Owings v. Morgan*, 4 Bibb, 274; *Lee v. Durrett*, 4 Bibb, 20; *Bramblet v. Pickett*, 3 B. Mon. 181; *Armstrong v. Mudd*, 10 B. Mon. 144; Bacon's Abr. title Grants.

*Frank Johnston*, for the appellees.

1. Specific performance is a matter, not of right, but of sound discretion, and will not be enforced where there would be undue advantage, or where it would be unconscientious, 1 Story Eq. Jur. §§ 750, 751, 769; nor where the character and condition of the property has been so altered that the terms and restrictions of the contract are no longer applicable. 1 Story Eq. Jur. § 750; *Hester v. Hooker*, 7 S. & M. 768; *Daniel v. Frazer*, 40 Miss. 507. The inequality need not amount to fraud. *Clarke v. Rochester Railroad Co.*, 18 Barb. 350; *London v. Nash*, 3 Atk. 512; s. c. 1 Ves. Sr. 12; *Dean of Ely v. Stewart*, 2 Atk. 44; *Talbot v. Ford*, 13 Sim. 173. This contract lacks the fairness essential in order that the court may exercise its jurisdiction. Fry on Specific Performance, §§ 233, 244; *Modisett v. Johnson*, 2 Blackf. 431; *Seymour v. Delancy*, 3 Cowen, 445; *Cabeen v. Gordon*, 1 Hill Ch. 51; *Clement v. Reid*, 9 S. & M. 535. Roach would be bound to retain title to the whole tract for ever, in order to be able to convey landings as the bank caved, or else to sell lots so burdened by the covenant that their value would be destroyed.

2. Uncertainty is another reason why the contract should not be enforced. The new landing is to be located where the public interest may demand. The grant does not afford the means of fixing the location. Specific performance of contracts to furnish a drawing-room in modern style, *Taylor v. Portington*, 7 De G. M. & G. 328; to construct culverts, *Webb v. London & Portsmouth Railway Co.*, 9 Hare, 129; *Stuart v. London & North Western Railway Co.*, 15 Beav. 513; and to do work to be fixed by an engineer's specifications, *South Wales Railway Co. v. Wythes*, 5 De G. M. & G.

880, is refused in equity. So of contracts to exchange city lots, *Ferris v. Irving*, 28 Cal. 645; to sell part of a piece of land for a paint-shop, *Camden & Amboy Railroad Co. v. Stewart*, 18 N. J. Eq. 489; to convey all the land the grantor owns at the expiration of five years, *Shelton v. Church*, 10 Mo. 774; and to convey property whenever the vendee secures the price. *Foot v. Webb*, 59 Barb. 88. The general rule is, that the contract, to be specifically enforced in equity, must be clear, definite, and unequivocal in its terms, *Patrick v. Horton*, 3 W. Va. 23, as well as fair, *Preston v. Preston*, 95 U. S. 200. It will not be enforced if ambiguous or unjust, *Snell v. Mitchell*, 65 Maine, 48; or where it is difficult to decide upon its meaning. *Buckmaster v. Thompson*, 36 N. Y. 558.

3. The covenant in this deed does not run with the land, nor is it binding on the defendants. There is no privity of contract or estate between them and Carson. Roach's covenant is personal, obligatory on him alone. The statutes cited by opposing counsel have no application to this case. They relate to livery of seisin, conveyance of land in the adverse possession of another, estates *in futuro*, and suits by assignees, but were not intended to prescribe a rule on the subject of covenants or the degree of certainty in matters of description.

CAMPBELL, J., delivered the opinion of the court.

The bill presents a case cognizable in a Chancery Court, and sets forth a covenant obligatory on Roach and all who claim any part of the Batchelor's Bend plantation under him, with notice of the covenant; and we do not discover any want of definiteness or fairness or consideration or any hardship in the contract at the time it was made, which should determine the court not to order its specific performance. It cannot be that they who acquired a portion of the Batchelor's Bend plantation, after the covenant with the complainant, and with notice of his covenanted right to the perpetual enjoyment of the exclusive control of a landing on the river front of the plantation, shall be permitted to enjoy the fruit of what was secured to the complainant. The case made by the bill entitles the complainant to relief; and, without anticipating

the particular manner in which it may be granted, we reverse the decree, overrule the demurrer, and remand the cause, with leave to the defendants to answer the bill within thirty days after the mandate herein shall have been filed in the court below.

*Decree accordingly.*



### JAMES LANIER v. THE STATE.

1. ASSAULT. *Weapon. Variance.*

Under an indictment for assault with a pistol, the accused cannot be convicted of an assault with another weapon.

2. SAME. *Res gestæ. Animus.*

But assaults with other weapons immediately preceding that with the pistol may be considered in determining the *animus* of the accused.

3. SAME. *Indictment for a higher crime.*

An indictment for assault, with intent to murder, will support a conviction of assault, even if the higher crime is proved.

4. SAME. *Apparent intent.*

One who shoots a pistol at a man, apparently designing murder, commits an assault, although he intends no injury. *Smith v. State*, 39 Miss. 521, limited.

5. CRIMINAL LAW. *Stare decisis. Vested rights.*

No one has a vested interest in an erroneous *dictum* of the appellate court, respecting the crime which he commits while such *dictum* is not overruled.

ERROR to the Circuit Court of Warren County.

Hon. UPTON M. YOUNG, Judge.

*W. P. Harris*, for the plaintiff in error, made an oral argument and filed a brief.

Lanier's purpose in firing was to frighten Slaughter, not to kill him. The want of intent disproves the criminal character of the act. Accidental appearances of an assault afford no more than ground for a civil suit for damages. 2 Bish. Crim. Law, §§ 23, 32. We cannot assume, in this case, that the jury found an intentional assault, and yet found it

to be without felonious intent, for there is nothing in the evidence to warrant such conclusion. They did not find that the shots were fired at Slaughter, and consequently the deadly weapon was not used against him. Unless, however, an assault with the pistol was shown, the conviction cannot stand, for the prisoner cannot be punished for an offence not charged against him.

*Buck & Clark*, on the same side.

The intention to do harm is the essence of an assault. *Smith v. State*, 39 Miss. 521; 2 Greenl. Evid. §§ 82, 83; *Vaughan v. State*, 8 S. & M. 553. Had the jury believed that Lanier fired to kill, they could not have acquitted him of the graver charge. Under the indictment he could not be legally convicted for the assault if made with a scoop, weight, whip, or cheese-box top. The shooting was the only thing in question; and, as the jury believed that the firing was done for the sole purpose of frightening Slaughter, an acquittal was necessary. Firing to alarm the prosecutor was not an assault.

*R. S. Buck*, on the same side, argued the case orally.

*T. C. Catchings*, Attorney-General, for the State, argued orally, and filed a brief.

The charge is that the assault was committed with a pistol, but not by shooting. Excluding the testimony relating to the firing, the offence is still made out. To draw the pistol for the purpose of shooting was an assault. *Hairston v. State*, 54 Miss. 689. The evidence, however, is that Lanier fired at Slaughter. But the offence would be complete if the pistol was discharged merely to frighten him. The question is determined as much by the probable and natural effect on the person aimed at, or by the tendency of the act to induce a breach of the peace, as by the defendant's intent to do violence. *State v. Shepard*, 10 Iowa, 126. The person assailed need not be put in actual peril, if a well-founded apprehension is created. 2 Bish. Crim. Law, § 32; *State v. Smith*, 2 Humph. 457; 2 Wharton Crim. Law, § 1243.

GEORGE, C. J., delivered the opinion of the court.

The plaintiff in error was indicted for an assault with intent to commit murder, and convicted by the jury of a com-

mon assault. He moved below for a new trial, which was refused, and then moved to arrest the judgment, which the court also refused to do. Hence this writ of error. It is necessary to set out the evidence, in order to understand the objections to the action of the Circuit Court. It was substantially proved that Wash Slaughter, the prosecutor, went with another person into Bazinsky's store in the city of Vicksburg, with the view of getting some money changed; and, as he passed the defendant, who was sitting in the store eating nuts, the latter threw one or more of the nut-shells into his face. The prosecutor asked why this was done, and if the defendant desired to "pick a fuss with him." To this the defendant replied by applying an insulting epithet to the prosecutor, and immediately commenced beating him with the top of a cheese box, and a tin or iron scoop, and at the same time kicking him. The prosecutor made no resistance, but fled out of the store, and as he did so the defendant threw a weight at him, which, however, missed its aim. He also took a whip from one of the witnesses and threw it at the prosecutor. As the latter reached the pavement in front of the store, he stooped to pick up a bottle lying on the pavement, when the defendant drew his pistol, and the prosecutor ran up the street or into an adjoining store, it does not clearly appear which. The defendant being then on the pavement in front of Bazinsky's store, or in the adjoining store, and pursuing the fleeing prosecutor, fired two shots from his pistol. According to the testimony of Chappel, a witness for the defence, the prosecutor fled into the adjoining store, and the defendant followed him, and, when the latter was in the door of this last-named store, he fired a shot into the ceiling above, and then fired another shot in the direction in which the prosecutor ran. The indictment charges an assault by shooting with a pistol.

It is now argued, in behalf of the plaintiff in error, that, as the evidence of Chappel warranted, if fully credited by the jury, a belief that the prisoner did not fire at the prosecutor at all, but deliberately shot in a direction in which it was impossible for the ball to strike the prosecutor; and that as the jury must have credited that evidence, in order to

have acquitted the prisoner of an assault with intent to commit murder, they must have found him guilty of a misdemeanor, upon the proof of the assault made with the blows inflicted by other means previous to the shooting; and that under the indictment the jury were not authorized to convict of an assault made by any other means than by a pistol. It is true that under the indictment the jury were authorized to convict of an assault with a pistol only. But it does not follow from this that, if the jury believed Chappel's evidence, they ought to have acquitted the prisoner, even of the higher grade of crime charged in the indictment. For, while Chappel does say that the first shot was fired into the ceiling above, he also states that the second shot was fired in the direction in which the prosecutor ran, though at the time it was fired he could not see the prosecutor. It is doubtful from Chappel's cross-examination whether the first shot was fired into the ceiling, and it by no means appears that, if it were so fired, it was the result of design on the part of the prisoner, rather than of a premature discharge caused by the confusion and excitement attendant upon a transaction of that sort.

While there can be no conviction, under this indictment, of an assault because of the defendant's acts before the shooting took place, still all that transpired before that time is highly important to be considered in determining the *animus* of the defendant in firing the two shots. He was the aggressor from the beginning. He attacked the prosecutor with great violence without the slightest provocation, and pursued him unresisting and fleeing to escape; and finally when the prosecutor, closely pursued and hotly pressed, stooped to pick up a bottle with which to defend himself, the accused drew a deadly weapon, and put the prosecutor again to flight, and then followed up his fleeing victim (for he can scarcely be called adversary) with a drawn pistol, and with it fired two shots, one of which at least was in the direction of the retreating prosecutor. Under these circumstances, it would require very clear and positive evidence of an intent not to kill the prosecutor before such a conclusion could be arrived at. The jury would have been well warranted by the evidence in finding the accused guilty of the crime charged in the indictment. That they failed

to convict him of the higher offence, established by the evidence, is no reason why the court should discharge him of the lesser offence, of which he has been convicted.

But there is another view equally conclusive against the prisoner. If we conclude that it is established that the shooting was without any intent to kill the prosecutor, then it must be certain that it was done to terrify him, and to drive him from the store or street where he then was. It is shown that the accused was near enough to the prosecutor for the latter to be within range of the pistol, and that his manner was extremely hostile and menacing. There is conflict in the authorities as to whether an assault can be committed by the presentation of an unloaded gun or pistol, when there is no actual intent to commit violence on the person of the adversary. We consider it the true rule, that no assault is committed when the person against whom it is presented, knew of the condition of the gun, and also of the intent of the accused not to injure. But a very different question is raised when a gun is presented which is unloaded, or a gun is discharged with an intent not to strike the person against whom it is apparently aimed, when all the circumstances attending such presentation or discharge must indicate to him that his life is endangered, and in fact sought, by the person presenting or discharging the gun. His rights are as much violated in such a case as if the actual intent to take his life existed; and the effect upon the public peace would be just as injurious. The better rule is to hold the accused to intend to injure, so far as such intent is necessary to constitute a mere assault, whenever from the circumstances attending the assault the person against whom it is directed has reasonable ground to believe that the intent to injure exists. *State v. Shepard*, 10 Iowa, 126, 130; 1 Bish. Crim. Law, § 548; *State v. Smith*, 2 Humph. 457. Of course in the statutory crime of an assault with intent to commit murder, where the specific intent to murder is the gist of the offence, if that specific intent be wanting there can be no conviction of that offence. The firing of a pistol or gun by a pursuing, threatening, and enraged person in a way that necessarily produces the impression on the mind of his adversary that it is aimed at him, and that his life is endangered, would



justify the person thus assailed in taking the life of the assailant. To hold that if, in fact, no intent to injure exists, no crime is committed, would be to justify a homicide on account of the perfectly innocent and lawful act of the party slain. The law is not so inconsistent as to doom the perpetrator of such an act to a justifiable death at the hands of a private citizen, and at the same time to hold that he has committed no offence against the slayer.

We do not consider the case of *Smith v. State*, 39 Miss. 521, when construed with reference to the facts, as laying down a rule different from what is here announced, for it was evident in that case that the prosecutor knew that there was no real danger. Some of the expressions in the opinion of the majority of the court go farther than the facts warrant, and are inconsistent with what we have announced as the true doctrine. To the extent of such inconsistency that case is overruled. The doctrine of *stare decisis* in criminal cases cannot be carried to the extent of allowing to violators of law a vested interest in rules which have been erroneously sanctioned.

*Judgment affirmed.*

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J. H. PIERCE v. H. L. JARNAGIN.

1. PARTNERSHIP. *Lawyers. Liability for copartner's acts.*

Want of authority in a firm of lawyers to sell claims held for collection is no defence to a suit against one partner, to recover money paid the other by a purchaser for claims which he has not received.

2. CONTRACT. *Rescission. Plaintiff in default.*

But such purchaser cannot sue if he has paid only part of the agreed price, for he has not complied with the contract.

3. SAME. *Ground for rescinding. Consistent act.*

The fact that the owner has reduced the claims to judgments for their full value constitutes no ground for a rescission of such contract.

4. VARIANCE. *Allegata et probata.*

The proof must conform to the pleadings.

ERROR to the Circuit Court of Noxubee County.

Hon. JAMES M. ARNOLD, Judge.

*J. H. Pierce*, the plaintiff in error, *pro se*.

1. This action was to recover what had been paid Jarnagin & Rives for the claims, for the full amount whereof judgments had been obtained long after the payment. Time is material in the purchase of claims against a third person. When the principal refused to ratify his agent's acts, and sued on the claims, Pierce was entitled to recover back his money. *Hanson v. Field*, 41 Miss. 712; *Jagers v. Griffin*, 43 Miss. 134; *Martin v. Tarver*, 43 Miss. 517; Story on Agency, § 300; *Cox v. Prentice*, 3 M. & S. 344; *Elliott v. Swartwout*, 10 Peters, 137; Smith's Merc. Law, 214; *LaFarge v. Kneeland*, 7 Cowen, 456. Jarnagin & Rives, who acted, as is insisted, without authority, have not accounted to their principal for the money, but have repudiated the contract.

2. Jarnagin's defence is, that the transaction was beyond the scope of the partnership, and rendered Rives alone liable. The rule, that an attorney holding a claim for collection cannot sell or compromise it, does not depend upon the doctrine of a partner's power to bind the firm. The ordinary business of a law partnership is to collect and settle claims, and frequently to compromise or sell them. The firm is bound by the acts of either partner, within the scope of the business, whether in excess of the authority given by the client or not. The act of a partner who exceeds the terms of the partnership renders his copartner liable, if the transaction is such that third persons may reasonably regard it as within the scope of the partnership business. *Heirn v. M'Caughan*, 32 Miss. 17; *Faler v. Jordan*, 44 Miss. 283; Story Part. § 108.

*Frank Johnston*, *S. M. Meek*, and *E. Dismukes*, on the same side.

*Rives & Rives*, for the defendant in error.

1. This is not a case of rescission by mutual agreement, nor one where the defendant first withdrew from the contract. The plaintiff himself gave it up, before any act of abandonment, if there was any, on the defendant's part. It is well settled that, under such circumstances, the plaintiff cannot recover money which he has advanced in part performance. *Ketchum v. Evertson*, 13 Johns. 359; *Morrison v. Ives*, 4 S. & M. 652.

2. An attorney intrusted with the collection of a claim has no authority to sell or compromise it. Hence Rives's transactions with Pierce were beyond the scope of his authority, and could not bind his copartner, Jarnagin, who had no knowledge of them. Jarnagin could only be bound by such acts of his copartner as were within the scope of the firm business, which was that of an ordinary partnership for the practice of law.

GEORGE, C. J., delivered the opinion of the court.

The plaintiff in error sued the defendant in error, in the court below, to recover the sum of \$475, which he had paid to one Rives, now deceased, who was an attorney at law, and the partner of the defendant in error, Jarnagin. It appears, that Rives, in the name of the firm and on its behalf, sold to the plaintiff certain claims, which the firm held for collection, at 25 per cent on their face value, amounting to the sum of \$620 ; of which the plaintiff paid \$475, at the time of his purchase and agreed to pay the remainder the next week. The sale was not to be considered as consummated till the balance of the purchase money was paid. The transaction took place in March, 1874, and soon afterwards Rives was attacked by a lingering disease, which terminated in his death in Sept., 1875. No entry was made of this contract on the books of Jarnagin & Rives ; and, being unconsummated, it was not communicated to the client. It does not distinctly appear when Jarnagin, the defendant in error, first heard of the sale made by Rives ; but it does appear, from his own testimony, that when he did hear of it, his information was that it was an individual contract between Rives and the plaintiff in error, by which the plaintiff in error deposited the \$475 with Rives to be used by him, as the plaintiff's representative, in the purchase of the claims. The plaintiff in error never mentioned the transaction to Jarnagin till after Rives's death. The balance of the purchase-money was never paid by the plaintiff in error, and when he demanded a return of the \$475, now sued for, an offer was made to transfer to him the claims, which had then been reduced to judgments, if he would pay the balance of the money he had agreed to pay, which he declined to do.

The plaintiff claims, in his declaration, that Jarnagin & Rives, having full power to sell the claims, and making the agreement of sale as above stated, abandoned and violated the contract, by surrendering the claims to the client, without crediting the \$475 on them, and that suits were afterwards instituted on them and judgments rendered for their full amounts. Jarnagin resists the recovery upon two grounds: First, that Jarnagin & Rives who held the claims for collection, had no power to sell them, that a sale of them was not within the scope of the partnership business, and that he gave no authority to Rives to contract in that matter in behalf of and in the name of the firm. Second, that the plaintiff is in default in never having paid the balance of the purchase-money, which, by the terms of the agreement made with Rives, was necessary to the completion of the sale.

In determining the validity of the first ground of defence, it becomes necessary to inquire into the power of Rives, as a member of the law partnership of Jarnagin & Rives, to bind the firm in the sale of claims placed in its hands for collection. A partner is not bound by the act of his associates, outside the scope of the partnership, unless he previously authorized or subsequently ratified it. The scope of a partnership is not capable of scientific definition, so as to remove all difficulty in determining what particular acts and transactions are within or beyond it. In some instances, the powers of the members of particular partnerships are fixed by law to a great extent. Thus, in commercial partnerships, each member has the power to bind the firm by borrowing money and making negotiable paper. In partnerships for farming and the practice of law, such powers do not exist. The powers of the members of a firm of any class may be enlarged by express stipulation between the partners or by the uniform usage of the firm. They may be diminished in the same way; but a restriction placed on the usual powers of the members of any particular firm will have no operation as against third persons dealing with the firm without notice of the restriction.

The question whether any given act is within the scope of the business of any particular partnership is determined by

the nature of the business, and by the practice of persons engaged in it, and evidence on both these points is therefore necessarily admissible. It is said, by an approved text-writer, that what is necessary to carry on the partnership business in the ordinary way, is made the test of the powers of the partners, where no actual authority or ratification can be proved. 1 Lindley on Part. 193, 194. This necessity is not that which may arise from the peculiar exigencies of the firm, growing out of extraordinary circumstances of good or ill fortune attending its business. It is not an exceptional and individual necessity, but such as arises from carrying on, in the ordinary way, the particular business in which the partnership is engaged. That a commercial firm is rich and has no need to borrow money does not deprive any member of the firm of the usual power of such partnerships to borrow money; nor does the fact that the peculiar condition, at any particular time, of a farming or law partnership is such that the borrowing of money would be necessary to save the property of the firm, confer on one of the partners the power to negotiate a loan in the name and on the credit of the firm. The necessity, on the other hand, need not be absolute, in the sense that the business in which the partnership is engaged could not be carried on to any extent without the exercise of the particular power. Certain powers in certain partnerships have long been recognized as useful and convenient for the transaction of the business in which they are engaged, and are usually exercised by the partners in the transaction of their business. All these powers are granted to the several members of the firm by the mere formation of the partnership, and the necessity which justifies their exercise consists in this, that the business in which these ordinary powers are usually employed could not be carried on in the ordinary way without their exercise. Each member of a firm is therefore to be considered as holding his associates out to the world as having authority to transact all business and exercise all powers usually transacted and exercised by persons engaged in the business carried on by the partnership. Jarnagin insists that because an attorney has no power to sell a claim placed in his hands for collection without special authority conferred by the client,

a sale of the claim, when this special authority has not been conferred, was beyond the scope of the business of the partnership.

We do not consider this want of authority on the part of the firm, as between it and the client, as the true test of the powers of the partners, *inter se*, as conferred by the partnership. That the act of the firm in any particular transaction does not bind the client, because he has not delegated the special authority requisite for its valid performance, is no reason why the same act, when performed by one member alone, should not bind his associates to all its legal consequences. A firm of lawyers may have a claim in its hands, as a mere deposit for safe-keeping, or to be delivered to another, and without the power of collection; yet, if one of them receive the money on it from the debtor, it would bind the other, because the latter has held his associate out to the world as having authority to collect claims placed in the hands of the firm for that purpose. The firm's want of authority from the creditor to receive the money would not have the slightest influence on the liability of the non-assenting member to the person who paid it. Attorneys do sell claims in their hands for collection when authorized specially by their client to do so. That is a part of their business when the authority is specially conferred. Can it be a defence to the firm that one of its members engaged in this business without first having obtained the requisite authority from its client? The firm, being engaged in that business, by that fact alone accredits to the world each of its members as having authority not only to speak on behalf of the firm in asserting its authority to sell, but also in acting for the firm in the transaction of the sale.

Attorneys at law, without special authority conferred, have no more power to compromise a claim, or to receive any thing but money in payment, than they have to sell a claim. Yet they do frequently, under power specially conferred, when the debtor is insolvent, compromise claims for less than their face value, and receive land and other property in payment. They also make sales of claims under similar circumstances. These acts, under the special authority conferred, thus become a part of their usual and ordinary business. To hold that,

when a member of a firm of attorneys performs one of these acts without special authority from the client, he is acting beyond the scope, of the business of the firm is confounding two very distinct things, — the general powers of a partnership as resulting from the scope of its business, and its power to act in any particular case, so as to bind the client, as resulting from the particular instructions which the client may have given. When the question is as to the regularity of the partners' acts, as between them and their client, we refer to the power which the client may have given or withheld. But when the question is as to how far the act of one partner binds his associate, we look solely to the powers which they have mutually conferred on each other, in forming the association and in the mode in which they have conducted their business under it. A client may enlarge or diminish the powers of the attorneys employed by him, considering them simply as his agents; but to allow him to enlarge or diminish the powers of the members of the partnership, as between themselves, would make his will or caprice, not the solemn contract and agreement of the partners and the nature of the business they are engaged in, the test of the authority which any member of the partnership has to act for his associates. The charges given to the jury on this point were contrary to the views here expressed, and are therefore erroneous.

The verdict, however, is clearly right on the second point relied on. The plaintiff alleged in his declaration that Jarnagin & Rives had authority from the client to make the sale, and he complained that, notwithstanding this, they suffered the claims to be sued on, and judgments recovered for the full amounts, without crediting the \$475. The proof shows that the remainder of the \$620, which was the price of the claims, was to be paid during the next week, after the partial payment of \$475, and that this sum was to be paid before the purchase was to be consummated. The plaintiff never paid this balance, nor offered to pay it. On the contrary, when, after Rives's death, he demanded a return of the \$475, he was met by an offer to assign the judgments if he would pay the remainder, and he refused to do it. He had made a bargain by which he was to have the claims, only upon the payment of

§620. He had partially complied by paying \$475. He now seeks to have the return of the \$475, when he refuses to carry out the contract on his part. A person is not allowed to make a contract and refuse to perform his part of it, and then demand a rescission, and the consequent return of what he has paid in its partial execution; and especially is he not permitted to do this when he can get the full benefit of the contract if he will perform his part.

The position relied on in the declaration and in the brief of the plaintiff in error does not establish the repudiation of the contract by Jarnagin & Rives. The bringing of the suits against the debtors and recovering judgments without giving them credit for \$475, was not a repudiation thereof, but rather the contrary. The \$475 was not a payment on behalf of the debtors on the claims, but a partial payment on a contract made between the attorneys and the plaintiff in error. If they had credited the amount on the claims, that would have been a repudiation of the agreement with the plaintiff in error, and would also have put it out of their power to comply with that contract when the plaintiff in error should pay the balance due on it. The bringing of the suits, and the recovery of judgments, was exactly what ought to have been done, in case Jarnagin & Rives intended to comply with the agreement of sale to Pierce.

The position taken in the brief of the plaintiff in error, that the sale made by Jarnagin & Rives was without authority from the client, and therefore conferred no rights on the purchaser, and for that reason he is entitled to a return of the money, cannot be available to the plaintiff, as he has distinctly alleged in his declaration that Jarnagin & Rives had such authority. He cannot make one case by his declaration and another by his proof.

*Judgment affirmed.*



## W. P. BROACH v. S. E. SING.

1. WILL. *Devisavit vel non. Demurrer to evidence.*

A demurrer to the evidence on the trial of an issue *devisavit vel non* is admissible.

2. NUNCUPATIVE WILL. *Animus testandi. Rogatio testium.*

The statement of a sick person, that she wants her husband to have her property, although made in the presence of two witnesses, cannot be probated as her nuncupative will, if she neither mentions a will nor calls on any one to note her language.

3. SAME. *Leading question.*

If such witnesses signed a written statement, purporting to contain the testatrix's words and to set forth the attendant circumstances, the question whether the statement is true, addressed to one of them, by the petitioner, on the trial of the issue *devisavit vel non*, is properly rejected as leading.

## APPEAL from the Chancery Court of Lauderdale County.

Hon. GEORGE WOOD, Chancellor.

Late at night, Mary Y. Broach, when she was very ill, but of sound mind, told her daughter that she wanted her son to have the articles in his room, and her husband the remainder of her property. The daughter requested the nurse to remember what her mother had said. Mrs. Broach neither mentioned a will, nor called on any one to notice her wish. She died at nine o'clock next morning. Her words, with the circumstances attending their utterance, were reduced to writing the same day, and signed by her daughter and nurse. The appellant having petitioned for the probate of the document, as his wife's nuncupative will, the appellee answered, an issue *devisavit vel non* was framed, and a jury impanelled. On the trial, the appellant asked the nurse whether the paper purporting to be Mrs. Broach's will, signed by the witness and the testatrix's daughter, was substantially true; but the question was objected to and excluded. Subsequently, the appellee demurred to the evidence, and the appellant contended that a demurrer was inapplicable to this issue. The court overruled the objection, sustained the demurrer, and dismissed the petition.

*Hardy & Grace*, for the appellant.

1. It was erroneous to withdraw the case from the jury, to sustain the demurrer to the evidence. After an issue *devisavit vel non* has been submitted to a jury under Code 1871, §§ 1099, 1199, either party has the right to insist upon a verdict. *Whitfield v. Hurst*, 9 Ired. 170. Any other view would abrogate the statute. A trial by jury of the issue may be always avoided if a demurrer to evidence will lie.

2. The question which the appellant's counsel proposed to ask the nurse was unobjectionable. The issue was whether the statements contained in the paper signed by her were true; that is, whether the paper contained, as it purported to do, Mrs. Broach's last will and testament. The question was the only pertinent one which could be asked under the issue.

3. The *rogatio testium* was clearly established, and the case is within the rule laid down in *Parkison v. Parkison*, 12 S. & M. 672. The proof showed that the words were spoken *animo testandi*, and that the testatrix believed she was making a will. *Gibson v. Gibson*, Walker, 364. The paper which was signed, on the day of Mrs. Broach's death, by the witnesses, while the facts were fresh in their minds, shows the circumstances, and should outweigh the testimony of the same witnesses given after they had forgotten exactly what occurred.

No counsel, for the appellee.

CAMPBELL, J., delivered the opinion of the court.

A demurrer to the evidence on the trial of an issue *devisavit vel non* is admissible. The question propounded to the witness was a leading one, and was properly rejected. The evidence was wholly insufficient to establish the alleged nuncupative will. The *rogatio testium* required by law was not proved. There is no satisfactory evidence of the *animus testandi*.

*Decree affirmed.*

## JANE HENDRICK v. H. W. FOOTE.

**MARRIED WOMEN.** *Vendor and vendee. Title bond. Assignment of note.*

The assignee of a married woman's note, for land sold by title bond, can compel her in equity to pay the note or surrender the land.

APPEAL from the Chancery Court of Noxubee County.

Hon. L. BRAME, Chancellor.

Thomas M. Sargent sold land to the appellant, a married woman, executed to her a bond for title, and took from her a note for the purchase-money. He subsequently indorsed the note for value to the appellee, who, after its maturity, filed this bill against the appellant, with her husband and Sargent, asking that she be required to elect to perform or rescind her contract. Her demurrer to the bill was overruled.

*Rives & Rives*, for the appellant.

Sargent's right against the appellant, being merely a creature of equity, was incapable of transfer; and Code 1871, § 2228, which relates only to obligations incurred by contract, does not apply.

*Foote & Foote*, for the appellee.

The indorsee of the note could maintain the bill, Code 1871, § 2228; *Kimbrough v. Curtis*, 50 Miss. 117; and was entitled either to the property or the payment of his claim. *Foxworth v. Bullock*, 44 Miss. 457; *Staton v. New*, 49 Miss. 807; *Nicholson v. Heiderhoff*, 50 Miss. 56.

CHALMERS, J., delivered the opinion of the court.

The only question presented, is whether the assignee of a note given for land, where the sale is by title bond, and the purchaser is a married woman, can by bill in equity compel the latter to pay the note or surrender the land. We answer the question in the affirmative. The note imposes no personal obligation on the woman, and no decree *in personam* can be obtained against her by the vendor, or any subsequent holder of the note; but she can be put to her election by either of them, as to whether she will surrender the land or pay for it. *Johnson v. Jones*, 51 Miss. 860.

*Decree affirmed.*

## T. D. PADDLEFORD ET AL. v. THE STATE, USE, ETC.

1. SUIT ON BOND. *Ambiguity. Evidence.*

If an administration bond fails to state which of the obligors is administrator, it is not fatally ambiguous, but may be explained by the record of his appointment.

2. SAME. *Variance. Pleading according to legal effect.*

Such bond should be admitted in evidence, if declared on according to its legal effect by distinguishing the administrator from the sureties.

3. BANKRUPTCY. *Discharge. Surety on bond.*

A surety who signs an administration bond before his adjudication in bankruptcy is not released from a liability thereon accruing after his discharge.

ERROR to the Circuit Court of Hinds County.

Hon. S. S. CALHOON, Judge.

The defendant in error, to recover a balance found due, Jan. 14, 1878, on final settlement of an estate, filed a declaration on the administration bond, alleged to be signed by Joseph E. Davis as principal, and T. D. Paddleford and S. S. Heard as sureties, and also filed, therewith, a bond signed by these persons, conditioned in the form prescribed by Code 1871, § 1118, except that it failed to state which of the "above bound" obligors was administrator. The suit was dismissed as to Davis. Paddleford and Heard pleaded *non est factum*, and the latter his discharge in bankruptcy. Trial by jury being waived, the court gave judgment against Paddleford and Heard, the plaintiffs in error. The bond filed with the declaration was offered in evidence by the plaintiff, but excluded for variance. The plaintiff then presented Davis's petition for administration, his oath of office, his letters, and the decree appointing him administrator, dated March 8, 1868, which recited that he had executed bond with T. D. Paddleford and S. S. Heard as sureties, and, with this explanatory evidence, again tendered the bond, which was admitted, notwithstanding the defendants' objection. Heard then read his discharge in bankruptcy, dated Aug. 16, 1869, from all liabilities existing March 24, 1868, saving such debts as are excepted from the operation of the bankrupt act.

*T. J. & F. A. R. Wharton*, for the plaintiffs in error.

1. The bond was void because of the patent ambiguity in not stating which of the obligors was the administrator. It did not refer to any extrinsic matter or thing explaining whose name was intended by the phrase "above bound." In *McGuire v. Stevens*, 42 Miss. 724, it is said that extrinsic evidence as to what the party intended to express, is obviously calculated to throw no light on the matter. No contract will be enforced unless its meaning can be ascertained from the instrument itself, or something to which it refers. *Peacher v. Strauss*, 47 Miss. 353; *Holmes v. Evans*, 48 Miss. 247; *Eskridge v. Eskridge*, 51 Miss. 522; *Bowers v. Andrews*, 52 Miss. 596; *Cogburn v. Hunt*, 54 Miss. 675; *Selden v. Coffee*, 55 Miss. 41; *Lee v. Newman*, 55 Miss. 365; *Kelly v. Reid*, ante, 89; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 278. The bond would not be more fatally defective if it omitted the name of the obligee or the penalty, or if it was not signed.

2. The bond was inadmissible under the declaration which counted on a bond executed by Davis as administrator. *Carter v. Preston*, 51 Miss. 423. With the accompanying proof it was not legal evidence without an amendment of the declaration, under Code 1871, §§ 621, 623. However unnecessary an amendment obviating the objection of variance may be, it is the course of prudence; for on it may rest a just defence. The rule is as inflexible in equity as at law. *Pinson v. Williams*, 23 Miss. 64; *Kidd v. Manley*, 28 Miss. 156; *Bowman v. O'Reilly*, 31 Miss. 261; *Fatheree v. Fletcher*, 31 Miss. 265; *Shaw v. Brown*, 35 Miss. 246; Story Eq. Pl. §§ 27, 257, 258.

3. By reason of his discharge in bankruptcy, Heard was entitled to a judgment in this case. Bankrupt Act, § 19; U. S. Rev. Stats. §§ 5067, 5068. The statute provides that the creditor may make claim "in all cases of contingent liabilities" or for "unliquidated damages arising out of any contract." In either case the liability was provable against the bankrupt's estate, and his discharge released him therefrom. Bankrupt Act, §§ 32, 34; U. S. Rev. Stats. §§ 5115, 5117, 5119; Bump on Bankruptcy, 87; *In re Clough*, 2 N. B. R. 151. It has been decided that a surety on a bond to the United States is not released by his discharge in bankruptcy; but the

reason given, to wit, "because the United States, not being specially named in said act, cannot be regarded as a creditor," indicates that the opinion of the court was that the discharge would bar any such claim not payable to the government. *United States v. Herron*, 20 Wall. 251.

*W. Calvin Wells*, for the defendant in error.

1. Heard was not discharged from obligation on the bond by the Bankruptcy Court. The discharge releases the bankrupt only from such claims as are provable in bankruptcy. *Jacobson v. Horne*, 52 Miss. 185. At the date of his discharge Davis had incurred no liability to the estate. The claim cannot be proved unless the contingency on which it depends happens before the order for the final dividend out of the bankrupt's assets. Bump on Bankruptcy, § 5068. The courts distinguish between a contingent demand and the contingency whether there will ever be a demand. *Woodard v. Herbert*, 24 Maine, 358; *Eastman v. Hibbard*, 54 N. H. 504; *Hinton v. Acraman*, 2 C. B. 367; *Riggin v. Magwire*, 15 Wall. 549; *Fowler v. Kendall*, 44 Maine, 448.

2. Extrinsic evidence was clearly admissible to show which of the three obligors was administrator. It was a latent ambiguity explainable by other testimony. *Bowers v. Andrews*, 52 Miss. 596. The bond showed what was intended, and came within the case of *County of De Soto v. Dickson*, 84 Miss. 150. It was valid by reason of Code 1857, p. 139, art. 201: *Boykin v. State*, 50 Miss. 375; and was part of a record, all of which was admissible to show the liability of the obligors.

CAMPBELL, J., delivered the opinion of the court.

An examination of the whole record of the grant of administration removes all uncertainty as to the bond. The perusal of the condition suggests no incurable uncertainty as to who is administrator. It recites that the "above bound" are administrator. Three persons were the "above bound," all of whom were administrator, according to the recital; but the extrinsic evidence shows that Davis was administrator, and the other persons were sureties on his bond as such. The bond was declared on, according to its legal effect, and was properly admitted in evidence.

The discharge in bankruptcy of Heard, and, as may be justly supposed, the settlement of his estate as a bankrupt, occurred before any breach of the bond on which he was surety. It is inconceivable how any claim or demand against his estate could have been proved by reason of his suretyship on the bond. It was an administrator's bond executed on March 8, 1868. Heard petitioned to be adjudicated a bankrupt on March 24, 1868, and was discharged as such on Aug. 16, 1869. No breach of the bond occurred until several years thereafter elapsed. Until a breach of the condition of the bond, what demand could have been made against the surety? True, he had *contracted* to be liable on the bond for the faithful administration, by his principal, of the estate; but unless some default should be made therein by his principal, he could never be required to pay anything. No default had been made, and it could not be assumed that any would occur. Was it admissible to calculate the chances of a breach of the bond, and fix the sum for which a claim might be proved against the bankrupt's estate? How would this calculation have been made? And, if made, and the amount fixed and proved, and a dividend received, it might have resulted that no breach of the bond occurred, and that an allowance had been made and payment made for a liability which never happened.

Under the Bankrupt Act of 1841, it was held that "as long as it remained wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable." *Riggin v. Magwire*, 15 Wall. 549. Although the language of the Bankrupt Act of 1867 is somewhat different from that employed in the act of 1841, it is true, under the act of 1867, that a discharge in bankruptcy has no effect on demands or liabilities which could not be proved against the estate of the bankrupt. That is the language of the law. "A discharge . . . shall . . . release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy." Provability against his estate in bankruptcy, as a means of sharing in the assets, is the test of whether a claim was discharged by the discharge of the bank-

rupt. We have assumed the impossibility of so proving any claim, liability or demand against Heard, by reason of his execution of the bond sued on, as to entitle any one asserting such claim to share in his estate as a bankrupt, and it follows that his liability on the bond for any breach of its condition, occurring after the settlement of his estate in bankruptcy, was not affected by his discharge. The engagement as surety existed at the time of his petition for adjudication as a bankrupt; but for years after that it remained wholly uncertain whether this engagement would ever give rise to an actual liability, and no calculation could remove the uncertainty, or estimate the value in money of the possibility, that the engagement might ripen by time and events into an actual liability. *Jacobson v. Horne*, 52 Miss. 185; *Loring v. Kendall*, 1 Gray, 305; *French v. Morse*, 2 Gray, 111; *Woodard v. Herbert*, 24 Maine, 358, and cases there cited; *Eastman v. Hibbard*, 54 N. H. 504; *Greenville & Columbia Railroad Co. v. Maffett*, 8 S. C. 307. In *Jones v. Knox*, 46 Ala. 53, and *Reitz v. People*, 72 Ill. 435, the contingency upon which the surety's liability on the bond became fixed, occurred in time for a demand on account of this liability to be proved against his estate in bankruptcy, and the surety was held to have been discharged by his discharge as a bankrupt. *McMinn v. Allen*, 67 N. C. 131, presents the case of an adjudication as a bankrupt on the petition of the applicant filed several years after the commencement of the action for a breach of the bond sued on, and the discharge in bankruptcy was held to discharge the liability on the bond broken long before. *Choate v. Quinichett*, 12 Heisk. 427, is a case in which a surety on a replevin bond, conditioned for the forthcoming of property to abide the judgment of the court in an action of replevin, was held to be discharged by his discharge in bankruptcy, the adjudication and discharge both occurring pending the suit in which the bond was given and after its execution. We are not willing to follow this decision. In the absence of a decision by the Supreme Court of the United States as to the scope of the discharge in bankruptcy as affecting engagements of the bankrupt before his bankruptcy, such as we have under consideration, we adopt the views above expressed.

*Judgment affirmed.*



## MARGARET A. CALDWELL v. JOHN HART ET AL.

1. HUSBAND AND WIFE. *Plantation supplies. Statutory agency.*

A husband's power to contract for himself, is not absorbed in his statutory agency for his wife, and her plantation is not liable for supplies which he obtains on his own credit, unless it receives the benefit of the purchase.

2. SAME. *Use of supplies. Agency. Estoppel.*

The mere fact that a husband, in purchasing supplies, states that they are for a plantation, which the seller believes to be his, does not estop his wife, who in fact owns the plantation, to deny that they were used thereon.

3. SAME. *Charge on wife's estate. Husband's agency.*

The doctrine by which the wife's plantation is charged for supplies used thereon, reviewed, and the husband's statutory agency discussed in connection therewith.

4. SAME. *Family supplies. Wife's consent.*

A married woman's separate estate cannot be charged for family supplies, purchased by her husband on his credit, without her consent.

5. SAME. *Chancery practice. Evidence. Decree.*

Under a bill to enforce the statutory charge for plantation supplies, if the proof shows supplies both for the plantation and the family, but negatives liability for the family supplies, no decree can be rendered for the former, without distinguishing them from the latter.

APPEAL from the Chancery Court of Hinds County.

Hon. E. G. PEYTON, Chancellor.

*Nugent & McWillie*, for the appellant.

The bill states that the account was for plantation supplies ; but Hart testifies that it was for both family and plantation supplies, without distinguishing them. This is a failure of proof. The grounds of liability are different in the two cases. *Guion v. Doherty*, 48 Miss. 538 ; *Cook v. Ligon*, 54 Miss. 368 ; *Grubbs v. Collins*, 54 Miss. 485. It is not affirmatively shown that the plantation supplies, if there were any, ever reached the plantation, while, under the facts in this case, only the use of them could make the place liable. Entire absence of knowledge, not to say consent, negatives liability for the family supplies, which, like the others, were sold to the husband on his credit.

*M. Green*, for the appellees.

The husband, who is, by the statute, constituted agent for the purchase of plantation supplies, can bind his principal within the scope of his power, and the merchant, who sells him such supplies for the plantation, is not compelled to see to their use. *Wright v. Walton*, 56 Miss. 1. The wife cannot escape payment because her husband, who bought the supplies for the plantation, diverted them, as she says, after the purchase. She is estopped to make such defence by her agent's statement to the contrary, relying upon which the merchant parted with his property. The account was scanned in the court below, and all family supplies stricken out. By stating that he extended credit to the husband, Hart did not mean that he sold him the goods on his individual responsibility, but that he gave him time.

GEORGE, C. J., delivered the opinion of the court.

The appellees are merchants in the city of Jackson, and filed their bill in the Chancery Court of Hinds County, against the appellant, for the purpose of enforcing the collection, out of her separate estate, of an open account created by her husband. The bill exhibits the account, and states that the appellees sold the goods mentioned in it to Charles Caldwell, the husband, and charged the same to him, supposing that he was the owner of the plantation, which really belonged to the wife. The bill admits that the entire credit for the goods was in the first instance given to the husband, under the supposition that he was in fact the owner of the wife's estate, and that after the husband's death, the appellees sued his administrator and recovered a judgment, and that after such recovery they ascertained that the wife was the real owner of the plantation. The bill further charges that the goods sold to the husband were in fact for the benefit of the wife's separate estate, being supplies used and consumed in the cultivation of her plantation; and it is this alleged user which constitutes the equity of the bill as against the wife.

It will be observed that the bill does not seek to charge the wife's separate estate, upon the ground that the husband claimed to be acting for and on behalf of the wife in making

the purchases, or that the appellees considered him as her agent; but, on the contrary, it is distinctly averred that the appellees contracted with the husband as principal, extending to him personally the credit, upon the belief that he was owner of the plantation. The sole equity of the bill to charge the wife's separate estate is that the appellees allege that they subsequently discovered that the husband purchased for the benefit of the wife's estate, which actually received the benefit of the goods. The answer positively denies that the goods, or any of them, were purchased for or used on the wife's estate; and there is no sufficient proof to overturn this allegation of the answer.

It is now insisted that, because the goods were purchased by the husband, and he stated that they were for the use of the plantation, which the appellees supposed to be his, but which was really the wife's, she is estopped to deny that they were received by her and used on the plantation and for her benefit. We do not consider this a just view. If it be conceded as an established rule that, where the husband professes to act for and on behalf of the wife, under his statutory authority to bind the wife's estate by his contracts for supplies for her plantation, and he is treated with by the merchant in that capacity, his mere statement that the supplies purchased by him were for the use of the wife's plantation, would estop the wife from asserting the contrary, it by no means follows that when he acts on his own behalf, and treats with the merchant on that basis, his statement as to the use which he intends to make of the goods would have the same effect. The reason why there would be an estoppel in the first case, if the estoppel were allowed at all, would be that the husband, being accredited with an agency which he assumed to execute, is also accredited to make any statement within the scope of his authority, concerning the business which he is transacting. The party could only know by his statements whether he was proposing to act as agent rather than on his own behalf, and if as agent, whether the particular contract was on behalf of his principal. It is too clear for controversy that where a person who is an agent contracts in his own name, on his own behalf, and on his own credit, he alone is responsible. If it be

sought to charge an undisclosed principal on such a contract, it must be shown that the contract was really on behalf of the principal and for his use ; but then the seller must make his election to charge the principal before payment by the principal to the agent, and while the state of the account between the principal and agent is in favor of the latter. Story on Agency, § 291, and note. In this case the husband contracted on his own behalf, in his own name, and on his own credit, which is admitted by the appellees to have been good at the time. He did not even pretend to be an agent. He made no declaration that he was acting for the benefit of the wife's estate or on her behalf. And it is attempted now to show that he was really acting for his wife, not by proving that she received the benefit of the contract, or that the husband was secretly acting for her, but by proof only that the husband did not have the use for the goods which he stated he had at the time he bought them.

The agency of the husband to make contracts for supplies for the plantation of the wife, where no consent of the wife is shown, results from a purely statutory power, which he may exercise or not at his discretion. He is under no obligation or duty to exercise it, and his agency for the wife exists under the statute only when he makes such a contract or professes so to act for the wife. The fact that he possesses this power affords no reason why, when refusing to exercise it, he may not act for himself. His personal rights and powers are not absorbed in this power to act for the wife, nor destroyed nor suspended by the existence of the marital relation. Marriage imposes no disabilities upon him. In this case the contract of the husband and the appellees was a contract in which the latter were sellers and creditors, and the former was purchaser and debtor. It conferred no rights and imposed no obligations on any third party. Both parties were free agents and had a right to make the contract. If the creditor seeks to hold another party liable for the avails of the contract, he must do so on some other ground than his right to enforce the contract against one who is no party to it. There is such a ground, and it arises out of the obligation of the wife to pay for a benefit which her estate has received from the money or goods of a third party. But

the benefit must be shown to have been received ; for, without its reception, there is no duty on the wife to pay. When this obligation is imposed by a court of equity, it is not the enforcement of the contract made by the husband on his own credit and professedly for his own use, but the giving of a right in opposition to the contract. By the contract in this case the husband was debtor for supplies furnished for his benefit, and the enforcement of it would be compelling him to pay his own debt. But the relief sought is to compel the wife to pay the debt upon the ground that the supplies were for her use, the contract to the contrary notwithstanding. This relief would absolve the contract-debtor from liability, since the creditor cannot enforce payment twice for the same demand. The decree would be a nullification of the contract, not an enforcement of it.

In all the cases decided by this court in which the supplies were charged to the husband and yet payment for them was enforced out of the wife's estate, it appeared that, notwithstanding the goods were charged against the husband, the credit was really given to the wife ; and it also appeared that the supplies were actually used for the benefit of the wife's estate. We do not mean to say that when the credit was given to the wife, though the charge was made against the husband, and when the latter, in purchasing the supplies, professed to act for and on behalf of the wife, it is necessary to show that the supplies actually went to the wife's benefit in order to hold her estate liable. In *Montgomery v. Eveleigh*, 1 M'Cord Ch. 267, and *Cater v. Eveleigh*, 4 Desauss. 19, which were cited and relied on by this court in *Guion v. Doherty*, 43 Miss. 538, the right to recover against the wife's estate, when the credit was originally given to another, was put expressly upon the ground that the wife's estate had received the avails of the contract ; and this, we think, is the true ground upon which to place it.

But there is another ground equally fatal to the claim of the appellees. The bill charges that the goods sold were plantation supplies. The testimony of one of the appellees, when examined as a witness on his own behalf, was that they were both family and plantation supplies, and there is not a par-

ticle of evidence to distinguish those which were for the use of the plantation from those for the use of the family. If it were competent at all to recover for family supplies under the allegations of the bill, there is a total failure to show the wife's consent for her husband to make the purchase on her credit. Without such proof, there could be no remedy against her. The proof negatives both the consent of the wife that the husband should purchase family supplies on her credit, and the fact that he bought on her credit. Under the statute, the wife cannot be charged for family supplies unless she buys them herself on the credit of her estate, or the husband buys them, with her consent, on the like credit. The husband is primarily bound to furnish family supplies, and the wife can never be charged for them except by her consent. All the goods here were sold on the credit of the husband, and after that it was impossible to make the wife liable for such of them as were supplies only for her family and not for her plantation. There being a total failure to distinguish the articles intended for plantation supplies from the others, it is impossible to say how much should be charged to the wife, and in such a case there is a failure to make out the complainants' case. A decree must be for a sum certain, based on evidence reasonably sufficient to show the sum due. The amount cannot be arrived at by mere conjecture.

*Decree reversed and bill dismissed.*

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### RICHARD HOBSON v. REBECCA EDWARDS.

1. **VENDOR AND VENDEE.** *Express lien. How reserved.*

An express lien on land, which will not be lost by assignment, can be reserved in the note for the purchase-money.

2. **MARRIED WOMAN.** *Conveyance. Separate estate.*

If a wife's land is bargained in part consideration for land deeded her husband, her subsequent conveyance thereof to a vendee of her husband's grantor binds her, although she devotes the price to pay the balance due from her husband to such grantor.

APPEAL from the Chancery Court of Hinds County.

HON. E. G. PREYTON, Chancellor.

The appellant, who conveyed land to W. H. H. Green, for which the land in controversy, then the estate of Mrs. Green, was to be taken in part payment, prior to a conveyance to him, sold it to the appellee, and, to save expense, had Green and his wife make a deed directly to her, reserving no lien and reciting that the consideration had been paid. The appellee paid the appellant the cash part of the price, and, in pursuance of an understanding with him, executed to Mrs. Green her note for the balance, reserving a lien on the land in controversy therein described. Mrs. Green, with her husband, in pursuance of the understanding, indorsed the note to the appellant, who filed this bill, to which the appellee answered that the note was without consideration and unsecured by lien.

*Nugent & McWillie*, for the appellant.

1. The appellant, who was the appellee's vendor, was entitled to the lien, although he was not her grantor. *Holloway v. Ellis*, 25 Miss. 103; *Russell v. Watt*, 41 Miss. 602; *Rutland v. Brister*, 53 Miss. 683. The fact that the note was payable to Mrs. Green was open to explanation.

2. The conveyance by Green and wife is good. She had a right to sell her separate property, and give her husband the benefit of the conveyance. The appellee's title is valid, and she cannot impeach her note for want of consideration.

*Shelton & Shelton*, for the appellee.

1. The note being payable to Mrs. Green, and executed to secure her, the appellant has no lien. *Rutland v. Brister*, 53 Miss. 683; *Patterson v. Edwards*, 29 Miss. 67. As none was reserved in the deed, Mrs. Green's lien was lost by indorsing the note to the appellant. *Skaggs v. Nelson*, 25 Miss. 88.

2. Mrs. Green's deed to the appellee was made in payment of the balance which her husband owed the appellant for other land, and is, under Code 1871, § 1778, not binding on the wife beyond the amount of her income. *Klein v. McNamara*, 54 Miss. 90. The appellant, who has failed to comply with his contract by making a good title, cannot enforce the note. *Rutland v. Brister*, 53 Miss. 683.

CAMPBELL, J., delivered the opinion of the court.

The complainant had an express lien on the land by virtue of the stipulation of the note for the purchase-money, that it should be a lien on the land. *Baker v. Field*, MS.; *Eskridge v. McClure*, 2 Yerger, 84; *Osborne v. Royer*, 1 Lea (Tenn.), 217. Being an express lien by contract, and not a vendor's lien, it attended the note in its transfer, and was not lost by its assignment. *Stratton v. Gold*, 40 Miss. 778.

The complaint of the defendant, that she did not acquire title to the land by the conveyance of Mrs. Green and her husband, because Mrs. Green might at any time avoid the conveyance as one made for the separate debt of her husband, is unfounded. The consideration of her conveyance was the payment to Hobson of part of the purchase-money of the land conveyed, and the note of the appellee for the remainder, payable to Mrs. Green. It was competent for Mrs. Green to devote the price of the land, when paid, to any use which she approved; and it was devoted to her own use in this transaction, as the land conveyed by Hobson to her husband, and paid for by her, in part, by her conveyance of the land in controversy to the appellee, was held by her husband, *pro tanto*, "only as trustee for her use." Code 1857, p. 886, art. 24. Upon the facts presented by this record, Mrs. Green cannot successfully assail the title vested by her conveyance in the appellee.

*Decree reversed and decree here for the appellant.*

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W. F. LEWIS v. D. R. DUNLOP.

GARNISHMENT. *Duties and liabilities of garnishee. Amending answer.*

A garnishee who, after answering that he owes negotiable notes, has notice that they were assigned before the garnishment, unless he amends his answer by stating the assignment, is not protected against the assignee by the recovery in the garnishment proceeding, but subjects himself to double payment of the debt.

APPEAL from the Chancery Court of Newton County.  
Hon. T. B. GRAHAM, Chancellor.



*W. H. Hardy*, for the appellant.

The garnishment, followed by the judgment and levy, and the sale, which satisfied the judgment, was a payment of the notes, and, these facts, being admitted by setting down the case for hearing on bill and answer (Code 1871, §§ 1025, 1081), constituted a complete defence to the present proceeding, and the decree of foreclosure was erroneous.

*G. B. Huddleston*, for the appellee.

The facts stated in the answer are insufficient to relieve the appellant from liability, because it does not appear that he discharged his duties as trustee of the parties interested in the debt, by setting up the assignment in the garnishment proceeding, although he had notice thereof before judgment. Code 1871, §§ 1451, 1452, 1453; *Oldham v. Ledbetter*, 1 How. 43; *Kellogg v. Freeman*, 50 Miss. 127.

*Frank Johnston*, for the appellant, in reply.

The judgment on the garnishee's answer operated to transfer the debt so that the garnishee became debtor to the plaintiff in the writ. That judgment has been executed, and the Chancery Court cannot vacate it by declaring that the appellant is debtor to the appellee.

CHALMERS, J., delivered the opinion of the court.

The bill alleged that the notes sued on had been assigned to the complainant, and that the respondent, who was the maker, had notice of the transfer at and before the maturity of the notes, to wit, on Sept. 10, 1876. The respondent answered that he had in a suit at law between one Spencer and Garner, the original payee of the notes, been garnished as the debtor of said Garner; that he had answered on July 15, 1876, admitting his indebtedness to Garner upon the notes now sued upon; that judgment had been entered against him upon his answer, under which judgment his land had been levied on and sold. He expressly denied that any notice of the transfer of the notes had been given him at the time he filed his answer as garnishee in the suit at law. The complainant set the case down for hearing upon bill and answer before the expiration of the period allowed for taking depositions, thereby admitting the truth of the answer. He had

decree, from which the respondent appealed. The bill alleged that the notes were transferred to the complainant in May, 1876 (before the institution of the action at law, in which the respondent was garnished), and that notice of the transfer was given to the respondent on September 10th following. The answer does not deny this, but avers that before notice of the transfer, to wit, on July 15th, respondent had answered as garnishee, and it denies that at that time he had notice of the transfer. But the answer shows that no judgment was entered upon the answer as garnishee until March, 1877, long after the time when, according to the undenied allegations of the bill, notice of the transfer had been given. Admitting the answer, therefore, to be true, it constituted no defence to the bill, because it was the duty of the respondent, as garnishee in the action at law, having received notice of the transfer of his notes after the filing of his answer, and before judgment upon it, to put in an amended answer informing the court that he was no longer the debtor of his original creditor, but of the present complainant, who had become the holder of the notes. This would have been his duty even after judgment and before satisfaction by execution. *Oldham v. Ledbetter*, 1 How. 43; Code 1871, §§ 1451, 1452, 1453. Not having discharged the duty to his new creditor which the law imposed upon him, he has subjected himself to a double payment of the debt.

*Decree affirmed.*

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### H. W. KINARD v. THE STATE.

1. UNLAWFUL COHABITATION. Code 1871, § 2486.

The offence of unlawful cohabitation consists in openly living together as man and wife in illicit intercourse, and it is not necessary that the parties should represent themselves as married. *Carotti v. State*, 42 Miss. 334, explained.

2. SAME. Marriage. Const., art. 12, § 22.

The Constitution of Mississippi does not create the relation of husband and wife between persons living together in open concubinage at the date of its ratification. *Floyd v. Calvert*, 53 Miss. 87, cited.

ERROR to the Circuit Court of Hinds County.

Hon. S. S. CALHOON, Judge.

H. W. Kinard and a negro woman, with whom he had lived since the year 1868, were, in January, 1879, indicted and convicted of unlawful cohabitation. After sentence, the woman submitted to a short imprisonment, but Kinard brought up the case.

*J. W. Jenkins*, for the plaintiff in error.

1. In order to violate Code 1871, § 2486, the parties, without being married, must live together, in the open assumption of the forms and rights of matrimony. They must hold each other out to the world as husband and wife. *Carotti v. State*, 42 Miss. 334. Secret intercourse between master and servant is insufficient. *State v. Marvin*, 12 Iowa, 499; *Wright v. State*, 5 Blackf. 358; *Commonwealth v. Calef*, 10 Mass. 158; *Searls v. People*, 13 Ill. 597.

2. These persons had been cohabiting since 1868, as they were in 1879. If they lived together so as to be liable under the statute, they became husband and wife by the ratification of the State Constitution in 1869 (Const., art. 12, § 22), and cannot, ten years afterwards, be punished for performing their duties as law-abiding citizens.

*T. C. Catchings*, Attorney General, for the State.

1. It is unnecessary that the parties should hold themselves out to the world as husband and wife. They commit the offence when they unlawfully cohabit. The proof brings this conviction within the rule stated in *Carotti v. State*, 42 Miss. 334.

2. The Constitution, art. 12, § 22, was designed to protect innocent persons who, by reason of their former condition, had not been legally married, and had not the effect to unite those who were living together, as master and servant, but in illicit intercourse. *Floyd v. Calvert*, 53 Miss. 87.

CHALMERS, J., delivered the opinion of the court.

The testimony for the State, which the jury by their verdict have accepted as true, is to the effect that the plaintiff in error, who is an unmarried white man, lived in the same house with the co-defendant, an unmarried negro woman, for a series

of years ; that there was but one room in the house, and but one bed in that room ; that the parties were seen occupying this bed together as many as five or six times ; that they eat at the same table ; and that the woman became during the time the mother of three mulatto children, whom the plaintiff in error was in the habit of caressing and calling his boys. These facts abundantly warranted the verdict of guilty of unlawful cohabitation, and while they were negatived in part by the evidence for the defence, we cannot disturb the verdict of the jury unless error of law occurred to the prejudice of the accused.

It is not necessary, as argued by counsel for the plaintiff in error, that the parties should hold each other out to the world as husband and wife, nor is there any thing in *Carotti's case*, 42 Miss. 384, which so declares. When the court announces in that case that, in order to constitute the offence of unlawful cohabitation, "the parties must dwell together, openly and notoriously, upon terms as if the conjugal relation existed between them," it is not meant that they should pass themselves off upon the community as husband and wife, but only that they should openly and notoriously consort and live together as if they were husband and wife ; that is to say, as husbands and wives usually live. The doctrine enunciated is that clandestine acts of sexual intercourse, no matter how often repeated, do not constitute unlawful cohabitation unless the parties openly and notoriously live together as paramour and concubine, habitually assuming and exercising towards each other the rights and privileges which belong to the matrimonial relation. The decision is that no continuance of illicit intercourse makes out the crime so long as it is secret or attempted to be made so, but that, whenever secrecy is abandoned and the concubinage is open, the offence is complete. In the interests of morality, it is perhaps to be regretted that a more rigorous doctrine cannot be deduced from our present statute and the decisions upon similar statutes elsewhere.

The evidence for the State in the case at bar fairly brings the plaintiff in error within the rule as laid down, nor is there any thing in the instructions of the court of which he can complain. The fourth charge asked by him, and refused by the

court, announced the doctrine that if the defendants were living in open concubinage at the date of the ratification of our present Constitution, they became by its ratification husband and wife. This theory of the Constitution, if it ever needed refutation, was set at rest by the cases of *Rundle v. Pegram*, 49 Miss. 751; *Floyd v. Calvert*, 53 Miss. 87.

*Judgment affirmed.*

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S. F. HARTSELL v. JOHN M. MYERS.

1. AGRICULTURAL LIEN LAW. *Affidavit for writ of seizure. Amendment.*  
A justice of the peace, before whom affidavit for a writ of seizure has been made, and who has failed to sign it, may affix his name in open court after motion to dismiss.
2. SAME. *Proceeding in rem. No judgment in personam.*  
Under the act of 1876 (Acts 1876, p. 109), regulating liens on crops, no personal judgment for the debt can be rendered in excess of the property seized.
3. WRITTEN INSTRUMENT. *Parol evidence to explain.*  
When the date of payment is not expressed in a written lease, it may be fixed by parol evidence, showing the situation and surroundings of the parties.

ERROR to the Circuit Court of Rankin County.

Hon. A. G. MAYERS, Judge.

*C. C. Miller and W. Buchanan*, for the plaintiff in error.

1. By the provisions of the statute under which this suit is brought, the affidavit of the person praying the writ of seizure is the foundation of the proceeding. Without the magistrate's signature, there can be no affidavit, and he cannot be permitted to affix his name after the writ has accomplished its purpose. Oral evidence is inadmissible to give effect to an instrument, which is defective in a particular essential to its validity. 1 Greenl. Evid. § 86. 2. The statute does not authorize the court to adjudicate the parties' rights, except as to the property seized. It was not intended that any personal judgment should be rendered in this summary proceeding. Acts 1876, p. 111. 3. The lease being silent as to when the rent became due, parol evidence was admissible in explanation. Taylor's

Landlord and Tenant, §§ 160, 391; *Shackelford v. Hooker*, 54 Miss. 716.

*W. P. Harris*, on the same side, argued the points made in the foregoing brief, citing, as to the first, Acts 1876, p. 111, and as to the third, Taylor's Landlord and Tenant, § 391, and insisted upon the admissibility of the evidence explanatory of the lease.

*Lowry & McLaurin*, for the defendant in error.

The lease, being for more than one year, was required to be in writing, Code 1871, § 2892; and to it alone we must look for the date when the rent was due. 2 Story on Contracts, § 1212. No time being fixed, the term began at the date of the lease. Taylor's Landlord and Tenant, § 68. The act of 1876, p. 111, which was in force when the contract was made, entered into and became part of it. *Lessley v. Phipps*, 49 Mis. 790, 800. As by that law the crop could not be removed until the rent was paid, the parties evidently intended the rent to be due when the crop was gathered. If the personal judgment was wrong, it can be remedied by proper judgment in this court.

CHALMERS, J., delivered the opinion of the court.

The justice of the peace, before whom the plaintiff made his affidavit for a writ of seizure, failed to sign his name to the jurat. Upon motion to dismiss the writ for want of an affidavit, the court permitted the justice to affix his name, in open court, upon his statement that the oath had been duly administered to, and taken by the affiant, and that he, the justice, had inadvertently neglected to sign the jurat. There was, we think, no error in this, under our liberal system of amendments of pleading and process.

The plaintiff's demand for rent was based upon a written lease, and the principal point litigated was whether the rent was due. The lease was dated Oct. 11, 1876, and its term was for three years. By it the defendant agreed to pay "\$800 per annum, for three years," without specifying the times of payment. The writ was sued out on Nov. 10, 1878, upon the theory that the rent became due on the eleventh of October of each year. The defendant's position is that the rent was

not due until the end of each year, and consequently was not due for the current year at the date of the issuance of the writ. With a view of showing this, he proposed to prove that, though the contract was signed on Oct. 11, 1876, his term was not to commence, and in fact did not commence, until the first of January thereafter, and that there was another tenant on the place with an ungathered cotton crop on Oct. 11, 1876, who did not vacate until January, 1877. The testimony offered was excluded by the court as contradicting the written lease. This was erroneous. The lease did not fix the date of payment, nor did it fix the commencement or end of the term. True, it was dated Oct. 11, 1876, and was for three years; but immediately following the date were the figures, "1877, 1878, 1879," which seems to imply that the term was to run for the calendar years represented by these figures. If so, it commenced on Jan. 1, 1877, and, no day of payment being specified, the rent became due at the end of each year. It was competent to show the situation and surroundings of the parties, with a view of fixing the day of payment, it not being expressed in the written instrument.

It was error, also, to give a personal judgment against the defendant in excess of the value of the property seized. The act of 1876 (Acts 1876 p. 109), regulating liens on crops, and providing for their enforcement, under the provisions of which this proceeding was instituted, contemplates only a subjection of property seized to the liens of the several parties interested, and nowhere makes provision for the rendition of personal judgments. However desirable it might be to settle all the rights of the parties in one litigation, the lawgiver has provided only for a proceeding *in rem*, and, when the court has fully distributed the property seized and adjudged the costs, its jurisdiction under the statute is exhausted.

*Reversed and remanded.*

George, C. J., having been of counsel, did not participate in this decision.

## M. GEORGIE SMITH v. SAMUEL NELSON.

**TAX TITLE.** *Board of supervisors. Power to adjourn meeting.*

The board of supervisors having no power to adjourn to a time not appointed by law, a levy of taxes made at an adjourned meeting is void, and a sale therefor passes no title.

ERROR to the Circuit Court of Issaquena County.

Hon. B. F. TRIMBLE, Judge.

Ejectment by the plaintiff in error, who claimed under the tax title described in the opinion of the court.

*Frank Johnston*, for the plaintiff in error.

The only objection made to the tax title is that the taxes were levied at a meeting of the board of supervisors not authorized by law. Construing together §§ 1372, 1378, and 1687 of the Code of 1871, the adjourned meeting was legal. No power to levy the taxes was possessed by the board before the assessment roll was returned. The whole board fixed the day when the meeting would be held, and it is presumable that due notice, if any was required under § 1687, was given. *Williams v. Cammack*, 27 Miss. 209. The tax deed is *prima facie* evidence of the legality of the assessment and proceedings. Code 1871, §§ 1697, 1700; *Virden v. Bowers*, 55 Miss. 1.

*Miller & Hirsh*, for the defendant in error.

The acts of the supervisors at an illegal meeting are void. *Jones v. Burford*, 26 Miss. 194. It is unnecessary that the assessment roll should be received before the board can levy the taxes. The *prima facie* presumption of the legality of the meeting is overcome by the entries on the minutes of the board showing that it was an adjourned meeting, which is a legal impossibility. Dates for regular meetings are fixed by the statutes (Code 1871, §§ 1353, 1372, 1373, 1687) which also provide that, if special meetings are necessary, they may be called by the president of the board or any two members, by posting notice or by advertisement. *Expressio unius exclusio alterius*. *Gamble v. Witty*, 55 Miss. 26. If any part of the taxes was illegal, the sale was void. *Blackwell on Tax Titles*, 160, 161; *Shattuck v. Daniel*, 52 Miss. 834.



CHALMERS, J., delivered the opinion of the court.

The validity of the plaintiff's tax-deed depends upon the validity of the levy of taxes made by the board of supervisors of Issaquena County in September, 1871; and this in turn depends upon whether the boards of supervisors in this State can by order on their minutes adjourn, at the expiration of a term, to a day named other than that appointed by law for their regular meetings. The board of supervisors of Issaquena County met in July, 1871, at the time designated by law for levying the county taxes, but without making the levy adjourned by resolution until the first Monday in August. Upon the day named they met again, and adjourned over until the first Monday in September. Again they met and adjourned over until the fourth Monday of September, upon which last-named day they met and made the levy. These repeated delays grew out of the failure of the tax assessor to complete and file the assessment roll of the county at the proper time. Was the levy made at the adjourned meeting legal and valid?

Our boards of supervisors are partly legislative and partly judicial in their character. They are judicial as to their times of meeting, that is to say, their terms are fixed by law, duration limited, and the mode of calling special terms carefully prescribed by statute. Code 1871, §§ 1353, 1372, 1373. They have no more power to adjourn by resolution or order from one term to a day intermediate between the day of adjournment and their next regular meeting than the Supreme, the Circuit, or the Chancery Courts have. If the public interests require a special term the law prescribes for them a mode of calling it, just as it does for all other courts; and their acts at a meeting not appointed by law, or not convened in the proper manner, are as destitute of authority as would be the judgments of this or any other court rendered at a term unlawfully held. *Jones v. Burford*, 26 Miss. 194. It follows that the tax-deed was properly excluded.

*Judgment affirmed.*

## HENRY M. FLOYD, EXTR., ETC. v. A. L. PEARCE.

LIMITATION OF ACTIONS. *New promise. Account stated.*

The verbal acknowledgment of an account's correctness, making it an account stated, will not avoid the Statute of Limitations as applicable to open accounts. *Code* 1871, § 2165. *Reinhardt v. Hines*, 51 Miss. 844, and *McCall v. Nave*, 52 Miss. 494, criticised.

ERROR to the Circuit Court of Warren County.

Hon. UPTON M. YOUNG, Judge.

*Adam & Speed*, for the plaintiff in error.

A verbal acknowledgment of the correctness of an existing account is sufficient to make an account stated, but, to deprive the debtor of the benefit of the Statute of Limitations, the acknowledgment must be written. In England the doctrine was first announced shortly after the passage of Lord Tenterden's Act, which is the original of all the American statutes on new promises, including *Code* 1871, § 2165, and it is still followed in that country. *Williams v. Griffiths*, 2 Cr. M. & R. 45; *Cottam v. Partridge*, 11 L. J. (N. S.) C. P. 161; *Tarbuck v. Bispham*, 2 M. & W. 2; *Jones v. Ryder*, 4 M. & W. 32. The statute applies as well to promises made before as to those made after the debt is barred. *Chace v. Trafford*, 116 Mass. 529; *Weatherwax v. Cosumnes Valley Mill Co.*, 17 Cal. 344. There is no reason for a distinction. Angell on Lim. § 274; Browne on Actions, 66, 84. The view taken in *Reinhardt v. Hines*, 51 Miss. 844, that, to prevent loose pleading, the suit must be brought as on a new contract, does not affect the operation of the Statute of Limitations.

*A. M. Lea*, for the defendant in error.

The statute of 9 Geo. IV. ch. 14, the prototype of *Code* 1871, § 2165, applies to suits for the original debt, where evidence of an acknowledgment is given to rebut the statutory limitation. *Smith v. Forty*, 4 C. & P. 126. But the bar never accrued against this demand, which, becoming an account stated within three years of its date, had six more years to run. A stated account may be verbal. *Anding v. Levy*, ante, 51; *Stebbins v. Niles*, 25 Miss. 267, 348; *Willis v. Jernegan*, 2 Atk. 251. Its

effect is the same as if the debtor gave his note for the balance. *Bass v. Bass*, 8 Pick. 187. It is an original demand, constituting a new and distinct cause of action. *Ashley v. Hill*, 6 Conn. 246; *White v. Campbell*, 25 Mich. 463. It is a new contract, of which the accounting is the consideration. *Trueman v. Hurst*, 1 T. R. 40. Formerly, it was conclusive as evidence, *Holmes v. D'Camp*, 1 Johns. 34; and the plaintiff need not now prove the original items. *Bartlett v. Emery*, 1 T. R. 42, *note*. The account stated is not barred under six years. *McCall v. Nave*, 52 Miss. 494. Notwithstanding Code 1871, § 2165, it is apparent that, in *Reinhardt v. Hines*, 51 Miss. 344, if the account stated had been sufficiently proved by parol, the statute would have been held not to apply.

CHALMERS, J., delivered the opinion of the court.

The plaintiff below (defendant in error) counted in his declaration upon an open account and upon an account stated. At the trial, he dismissed his first count, and relied solely upon the account stated. In support of it, he proved by one witness that he, the witness, had seen the account sued on presented to the defendant's testator in his lifetime, and by him admitted to be correct. The court instructed the jury that, if they believed this to be so, the case was governed as to the period of limitation by the six years' statute applicable to express contracts, and not by the three years' statute applicable to open accounts. Code 1871, § 2151. Was this correct? Is it true that previous to the act of Feb. 26, 1876 (Acts 1876, p. 252), by which the period of limitation as to open and stated accounts was made the same, an account which was undeniably an open one in its inception could by the parol acknowledgment of its correctness be so changed in its character as thenceforward to be subject to a different Statute of Limitations and be thereby prolonged for six years thereafter? Such was assumed to be the law, both by the court and by counsel, in *Reinhardt v. Hines*, 51 Miss. 344, and in *McCall v. Nave*, 52 Miss. 494, 498; though perhaps in neither case was the doctrine authoritatively settled, because in both there was a failure to establish the account stated.

Unquestionably a stated account is an express contract within

the meaning of Code 1871, § 2151, and therefore by the terms of that section barred in six and not in three years. Undoubtedly an open account may by parol acknowledgment be converted into an account stated. This would, in any suit upon it, dispense with the necessity of proof of the items comprising it, and in the absence of restrictive words elsewhere in the statute would change the period of limitation. Hence, whenever the question presented here has arisen in States which recognize parol acknowledgments of debts as available to take a cause of action out of the operation of the Statute of Limitations, it has always and properly been held that after the acknowledgment the statute governing stated accounts, and not that relating to open accounts, is to be applied.

But by our Code of 1871, § 2165, it is declared that "in actions of debt, assumpsit, or on the case, founded upon any contract, no acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take any case out of the operation of the provisions of this chapter" (the chapter on limitations), "or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing signed by the party chargeable thereby." The period of limitation prescribed by the chapter as to open accounts is three years, and it is this limitation that the debtor is entitled to plead if there has been no acknowledgment. Does he lose this right by a parol acknowledgment? If so, has not the fact of such acknowledgment been made evidence of a new or continuing contract whereby to take the case out of the operation of the chapter, and to deprive the party of the benefit of it? Suppose the three years' bar has fully attached before the acknowledgment is made. Clearly the parol acknowledgment cannot be used as evidence of a "new" contract whereby the extinct debt is revived. But the language of the statute is equally emphatic that it shall not be evidence of a "continuing" contract whereby it shall be prolonged. The acknowledgment will convert the open account into a stated one, and dispense with proof as to its several items, and authorize the plaintiff to count in his declaration upon the *insimul computassent* rather than upon a *quantum meruit* or *quantum valebat*; but it will not in any

manner stop, change, or affect the period of limitation, because this is plainly prohibited by the statute.

It will not do to say that it is a question of pleading, and that, where the suit is upon the open account and to a plea of the Statute of Limitations the defendant has replied the parol acknowledgment, the statute makes the replication demurrable, but that if suit is brought upon the account in that shape into which by the parol acknowledgment it has been transformed, to wit, upon a stated account, the statute does not apply. The statute is not one of pleading, but of evidence. It declares that the acknowledgment or promise shall not be evidence of a new or a continuing contract, which is the same thing as saying that it shall be utterly inoperative and null, so far as the period of limitation is concerned. To permit a creditor to sue upon the cause of action as an account stated, rather than as an open account, and thereby defeat a plea of the Statute of Limitations as applicable to the original debt, would be practically to override the statute and to sacrifice a substantial right of the defendant to ingenuity in pleading.

Express or implied contracts under § 2151 of the Code are barred in six, and open accounts in three, years. Stated accounts are express contracts; and if the original dealing between the parties was such as to create an account stated, it was governed by the six years' bar until the passage of the act of Feb. 26, 1876, by which it is now put upon the footing of an open account. But, if the original dealing was by open account, it is no more competent to affect the Statute of Limitations applicable to it by a parol promise than it would be by such promise to revive a liability which had become completely barred. A "continuing" liability by parol is as much prohibited by the statute as a "new" one.

The English statute of 9 Geo. IV. ch. 14, commonly known as Lord Tenterden's Act, is the basis of § 2165 of our Code, as of all the American statutes requiring acknowledgments of old debts to be in writing to avoid the Statute of Limitations. From the adoption of that statute, the English rulings have been uniform, that the transformation of an open into a stated account does not affect the running of the statute. *Wil-*

*liams v. Griffiths*, 2 Cr. M. & R. 45; *Tarback v. Bispham*, 2 M. & W. 2; *Jones v. Ryder*, 4 M. & W. 32. We find only two American cases in which the point is directly presented, namely, *Chace v. Trafford*, 116 Mass. 529, and *Weatherwax v. Cosumnes Valley Mill Co.*, 17 Cal. 844; and in both the doctrine here announced is declared. In *Chace v. Trafford* the argument was presented and distinctly repudiated, in a well-considered opinion, that the effect would be different where the pleader declared upon an account stated. It will of course be understood that the acknowledgment or new promise in the case at bar occurred before the adoption of the act of Feb. 26, 1876. The instructions of the court below not being in accordance with these views, the cause must be

*Reversed and remanded.*

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ELIZABETH S. BARTON, ADMRX. ET AL. v. GEORGE W. PARKER.

CHANCERY COURT. *Commissioner's fee for stating account.*

A commissioner's compensation for stating an account should not exceed the fair and reasonable value of the work done.

APPEAL from the Chancery Court of Yazoo County.

Hon. E. G. PEYTON, Chancellor.

The appellee filed his bill in the court below for a partnership account of the firm of Barton & Parker, of which he was the surviving partner, making defendants the administratrix and heirs of Barton, who answered. An order of reference to a commissioner was made to state the account. He took depositions, and made out and reported the account, claiming two hundred dollars therefor. Various exceptions were filed, one of which related to the amount of his compensation.

*J. C. Prewett*, for the appellants.

The allowance to the commissioner for stating and reporting the account was excessive. Half the amount was enough for the work done. He charged the usual fees of a commissioner in chancery for the depositions.

*Garnett Andrews*, for the appellee.

Considering the skill, patience, and labor, necessary to read the twelve hundred pages of pleadings, exhibits, and proof, to carefully weigh and analyze them, and from them all, item by item, to make out the account, — no one competent for the task would have done the work for less than the allowance made. As the question, however, depends on an inspection of the record, the court can, if it thinks the amount excessive, determine what is proper, and make the decree which should have been rendered by the court below.

GEORGE, C. J., delivered the opinion of the court.

In addition to the errors of fact for which the decree is reversed, it is urged that the allowance of two hundred dollars to the commissioner for stating the account is excessive. We interfere with great reluctance with the action of the Chancellor in making allowances of this character, and probably would not feel justified in reversing for this alone. But we have carefully considered the objection, and are of opinion that one-half that amount would have been a liberal allowance for the service of stating the account, the commissioner having received the regular fees for taking the depositions. While it is proper that officers of court discharging duties of this kind, under the special direction of the court, should receive a fair compensation for their work; yet it should be borne in mind that in the allowance for such services there is no place for liberality or generosity. Suitors are taxed high enough when they are charged with the statutory fees; or, in cases like this, where they are made to pay the fair and reasonable value of the work done.

*Decree reversed.*

## S. D. MURFF, ADME., ETC. v. W. W. PETERSON ET AL.

CHANCERY COURT. *Probate practice. Master's report. Exceptions.*

On appeal from a decree confirming an administrator's final account, as restated, this court will not review the master's conclusions of fact, to which no exceptions were filed.

ERROR to the Chancery Court of Winston County.

Hon. L. BRAME, Chancellor.

The final decree of the Chancery Court confirmed the restatement of the plaintiff in error's final account, as reported by the clerk, to whom, on exceptions, it was referred as master, and directed distribution of the balance found due the estate, among the defendants in error, as distributees.

*R. G. Rives*, for the plaintiff in error, argued, in an elaborate brief, the propriety of the items of the administrator's account, the exceptions thereto, and the errors of fact committed by the clerk in restating the account.

*Nugent & McWillie*, for the defendants in error.

No error appears in the decree of reference as to the principles on which the account was to be restated, and, as no exceptions were filed to the master's report, this court will not hear any objection thereto. *Williamson v. Downs*, 34 Miss. 402.

CHALMERS, J., delivered the opinion of the court.

No exceptions to the report of the clerk and master having been filed in the court below, we are precluded by the repeated decisions of this court from passing upon the conclusions of fact arrived at by him, and sanctioned and confirmed by the decree of the Chancellor. *Cole v. Johnson*, 53 Miss. 94; *Williamson v. Downs*, 34 Miss. 402; *Fowler v. Payne*, 52 Miss. 210. The rule applies as well in probate as in equity proceedings. *Smith v. Hurd*, 8 S. & M. 682; *Benoit v. Brill*, 24 Miss. 83.

*Decree affirmed.*



## FRANK M. CANNON v. THE STATE.

57	147
73	419

1. INDICTMENT. *Finding and presentment. Entry.*

The fact that a general minute entry and indorsements on an indictment correspond in number, date of filing, and the name of the foreman of the grand jury, is sufficient to identify the indictment.

2. WITNESS. *Impeaching credibility. Former contradictory statement.*

While a conflicting statement on a former trial may be proved to discredit a witness, counsel's comment on the improbability of the first statement is inadmissible in evidence to show motive for the change in testimony.

3. SAME. *Animus. Motive for varying evidence.*

Nor can the fact be proved that a medical expert was not examined on the former trial to show the impossibility of what the witness then stated, although he was examined at the present trial, when the witness made a different statement.

4. SAME. *Bias. Contradiction of answer.*

But when the witness, in attempting to explain how he came to make variant statements, denies a fact bearing on the admitted variance, *semble* that the fact denied may be proved.

5. HOMICIDE. *Express malice. New provocation.*

If a man, on a casual meeting, is assaulted by another, towards whom he bears malice, and kills him with a deadly weapon, the jury must determine whether the act was induced by the assault or by malice.

6. JURY. *Prejudice. New trial.*

A conviction will be set aside, if a juror, who has, unknown to the accused, prejudged the case against him, states, on his *voir dire*, that he is unbiassed.

ERROR to the Circuit Court of Claiborne County.

Hon. J. B. CHRISMAN, Judge, did not sit in this case, but Hon. RALPH NORTH presided by interchange.

The record, after the entry of the organization of a grand jury with S. S. Neely as foreman, at the May term of the court, 1877, recited that, on June 7, 1877, the grand jury came into open court in lawful manner, and "upon their oaths and through their foreman, S. S. Neely, presented to the court the following true bills of indictment, numbered respectively, 26, 27, 28, and 29, in red ink, upon the upper right-hand corner of each of said indictments, each of which is indorsed a true bill

and signed by the foreman." Upon the back of the indictment on which the defendant was tried was written the following: "No. 28," in red ink, on the upper right-hand corner; below that, "May Term, 1877, Claiborne Circuit Court," and also:

<p>"The State v. Frank M. Cannon.</p>	<p>Murder.</p>	<p>A true bill. S. S. Neely, Foreman Grand Jury."</p>
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The indictment was marked by the clerk, "Filed and bench warrant issued, June 7, 1877." When convicted thereunder of the murder of Charles H. Martin, the defendant moved, in arrest of judgment, that the record failed to show the finding and presentment in court of the indictment by the grand jury.

The tenth instruction, for the State, was that, "When malice is shown, and the person against whom such malice existed be afterwards killed with a deadly weapon by the person harboring the malicious purpose, no mere provocation at the time of committing the act will relieve it of the character of a malicious killing, but it is presumed to be in consequence of the previous malice."

Charles H. Martin, who, with his mistress, Caroline Austin, occupied part of the house where Cannon lived with his family, and cultivated part of the same farm, assuming that Cannon was afraid of him, had repeatedly insulted him, imposed on him in various ways, and stated, in presence of his family, his intention to kill him. Cannon expressed resentment at this treatment. The day before the homicide, Martin locked up Cannon's horses, and when the latter released them said that he would force him to fight. Next morning he left the house with his gun. Cannon remained in his room. When Martin was returning, and according to the defendant's evidence, was aiming his gun at Cannon, the latter shot him through the window, one ball striking his left elbow-joint, on the inside.

Caroline Austin, who testified that the act was an assassination in pursuance of previous threats, was alleged to have asserted, before the committing court, that Martin, when shot, was holding his gun back of his neck, with both hands, unconscious of Cannon's proximity. She did not, however, so state on this trial, when examined after a medical expert had

pronounced the wound impossible, if the gun was held in that posture. Her testimony as to certain facts touching her locality at the time of the homicide was also declared to be different at the present trial from what it was before the magistrate. After she had denied on cross-examination that she made the contradictory statements, the accused proved her former testimony, and excepted to the court's refusal to admit evidence of the facts that the expert was not examined in the committing court, and that his counsel there argued that Caroline Austin's position could not have been as she then testified.

A juror, who was Caroline Austin's paramour after Martin's death, stated, on his *voir dire*, that he had neither formed nor expressed an opinion on the case. But, after the verdict, the prisoner learned by accident that he had said, in conversing about Caroline, that it was a heavy case, and he did not think Cannon would get clear. The motion, on this ground, for a new trial, like the motion in arrest of judgment, was overruled, and the prisoner brought up the case.

*E. S. Drake*, for the plaintiff in error, argued orally and filed a brief.

1. The object in offering to prove counsel's comments before the justice of the peace and that the medical expert was not examined at that trial, was to show that the difference in Caroline Austin's statements was not due to lapse of memory, but to designed adaptation of her testimony to the other evidence in the case. It is competent for the defence to offer any testimony tending to impeach the credibility of a witness for the prosecution.

2. A new trial should have been granted, because the juror who on his *voir dire* denied all bias was shown after verdict to have fully made up his mind to convict. *Cody v. State*, 3 How. 27. The accused was not tried by an impartial jury.

3. It was error to overrule the motion in arrest of judgment. *Friar v. State*, 3 How. 422; *Goodwyn v. State*, 4 S. & M. 520; *Laura v. State*, 26 Miss. 174; *Cachute v. State*, 50 Miss. 165; *Cornwell v. State*, 53 Miss. 385. The finding of the indictment on which the defendant was tried is not recited in the record. This is not one of the indictments mentioned in the entry as numbered on the upper right-hand corner.

*J. D. Vertner*, on the same side, argued the case orally and in writing.

1. No indictment against the plaintiff in error is shown by the minutes of the court to have been found. Return of the indictment must appear affirmatively of record. *Laura v. State*, 26 Miss. 174; *Dyson v. State*, 26 Miss. 362; *Jenkins v. State*, 30 Miss. 408; *Pond v. State*, 47 Miss. 39; *Cachute v. State*, 50 Miss. 165; *Cornwell v. State*, 58 Miss. 385. The record may aid the indictment, but not *e converso*. *Cody v. State*, 3 How. 27; *Abram v. State*, 25 Miss. 589. The red-ink mark on the indictment under which he was convicted cannot be identified as one of the marks mentioned in the recital. The entry must contain a distinct statement, *Laura v. State*, 26 Miss. 174, in the form given in *Green v. State*, 28 Miss. 687, 693, showing the style of the case and a description of the parties.

2. The juror was prejudiced against the accused, and answered falsely on his *voir dire*. A new trial must result. *Cody v. State*, 3 How. 27. Impartiality is essential, and without it there can be no constitutional jury. *Sam v. State*, 13 S. & M. 189. The bias of the juror was unknown to the defendant at the trial.

3. The accused should have been allowed to show Caroline Austin's motive for changing her testimony. It went to prove that she was testifying to convict, for the change was made to fit the case as varied in the Circuit Court. Her *animus* was a proper matter for the consideration of the jury.

*W. P. Harria*, on the same side.

1. The plaintiff in error was not tried by an impartial jury, and was erroneously refused leave to show the bad motive of the State's chief witness in changing her testimony. The bed-fellow of this vindictive witness, who falsely stated on his *voir dire*, that he had no opinion in the case, imposed himself upon the prisoner as a juror, and found him guilty of murder. This juror, with the means of getting the version of the main witness against Cannon, made before the trial a deliberate utterance, showing a consideration of the bearing of the evidence, and a prediction that the prisoner would be convicted. Cannon did not have a fair and impartial trial.

2. The tenth charge, when applied to the defendant's evidence, means that a man, who has resentment against another, provoked by continued ill usage, is deprived of the right of self-defence; that an attempt to kill a man after having wronged and threatened him is no palliation of homicide by the latter; and that a sense of wrong is a crime of so deep a dye as to forfeit one's right to protect his life. The old and true doctrine is that, where express malice is shown to exist, and there was also apparent necessity of self-defence, the court will submit to the jury the question, whether the killing was on account of the old grudge or on the new provocation. *State v. Martin*, 2 Ired. 101. If upon the old grudge, and the new provocation is the pretext to shelter it, then it is murder, otherwise not. Haw. P. C. 179; Kelynge, 28. To constitute murder in such case, the apparent necessity must be employed as a disguise, 1 Hale P. C. 451; Wharton Crim. Law, § 1028; and the killing must be on account of the former malice. 1 Bish. Crim. Law, § 648; Wharton Crim. Law, §§ 946, 979. Present provocation when shown throws the burden on the State to prove that previous malice caused the act. No presumption aids. 3 Greenl. Evid. § 127. For this erroneous charge, the judgment should be reversed; because it is on a material point, and it is not manifest that it did not mislead the jury. *Mask v. State*, 36 Miss. 77; *Josephine v. State*, 39 Miss. 613.

T. C. Catchings, Attorney General, for the State, made an oral argument and filed a brief.

1. The red ink "No. 28," with the date of filing and the signature of the foreman, identifies this indictment as the one numbered twenty-eight mentioned in the entry, as found and returned into court by the grand jury.

2. The expression used by the juror did not amount to an opinion as to the guilt or innocence of the accused. The instructions, taken as a whole, expounded the law correctly, and the testimony fully warranted the verdict. The result, being right, will not be disturbed on the ground of immaterial errors. The proof is clear that, while the defendant had been considerably provoked and irritated by the conduct and language of the deceased, nevertheless, at the time of the killing, he was in no danger, but shot a man who did not see him.

CAMPBELL, J., delivered the opinion of the court.

The evidence of the finding and presentment in court of the indictment by the grand jury is sufficient, and the motion in arrest of judgment was properly overruled.

An effort was made to show that Caroline Austin had testified, before the justice of the peace, to certain matters as to which she testified differently on the trial in the Circuit Court, and it was proposed to show that the counsel for the accused had commented, in the presence of Caroline Austin before the justice of the peace, on the impossibility of the truth of her testimony in certain particulars, wherein it was contended that she had, since hearing such comments, varied her testimony. The obvious purpose of the evidence offered was to suggest a motive in the witness for the alleged variance ; i.e., to escape, on the argument of the case in the Circuit Court, the criticism of her testimony which had been made on the trial before the justice of the peace. Great latitude is allowable on cross-examination to show bias and wrong motives in the witness, with a view to lessen the credibility of a witness thus impelled, and answers of a witness to questions as to bias and motive may be contradicted by evidence pertinent to show the bias of the witness who denies it when interrogated. But we know no legal mode of discrediting a witness except by cross-examination, conviction of an infamous offence, impeaching the general character for truth, and impeaching the credibility by evidence of contradictory statements at different times on a material point in the case, including, as above stated, the contradiction of the answers of the witness when interrogated as to bias or motive.

When it is proposed to discredit a witness by proving that on a former occasion he made a statement inconsistent with his statement on some point material to the issue, the *fact* of such contradictory statement, and not the reason for it, is the true subject of inquiry. If a witness, in attempting to explain how he came to make variant statements at different times, were to deny the occurrence of something bearing directly on the admitted variance, it may be that it would be allowable to show the occurrence thus denied ; but that is not the case here presented. The witness did not admit any contradictory state-

ment in her testimony on the different occasions, and, therefore, did not attempt any explanation of what she did not admit. She was not asked as to having heard the comments of counsel on her testimony in the examination of the case before the justice of the peace. The accused was allowed to show the alleged contradictory statements of the witness. The extent of the variance, and its influence as affecting the truth of her testimony, were to be determined by the jury from the fact of the discrepancy, if any, in her statements on the two occasions, without the independent testimony offered to lay the basis of a conjecture as to the motive in making the contradictory statements. Such testimony is too vague and uncertain to be relevant to the issue. It would lead to an undue multiplication of issues in a case. If the testimony offered and rejected had been admitted, it might have led to the inquiry as to what was said by counsel in their comments, and whether this was heard by the witness and how she understood it, and what effect it was calculated to have on her, all with a view to calculate the probabilities that she had been thus induced to change her testimony. The inquiry was too remote, and no error was committed in excluding the testimony offered.

The refusal to permit the witness, Smith, who was the justice of the peace before whom the accused was tried, to answer that Dr. McCallum was not examined before him as to the possibility of a certain wound having been received by the deceased while he held his gun back of his neck with both hands, was proper for the reason above given, and for the further reason that it does not appear that Caroline Austin had testified to the fact that the deceased was holding his gun in that position when he was shot, and the proposed testimony was not contradictory of her testimony, to contradict which was the object of the examination on this point.

The tenth instruction for the State should not have been given. It is true that, when a premeditated design to kill or do other great bodily harm is ascertained to have existed, and there is a consequent unlawful killing, apparently in pursuance of such design, any provocation which immediately precedes the act of killing is to be thrown out of the case and to go for nothing, unless it can be shown from the circumstances of

the killing that the purpose to kill or do great bodily harm was abandoned before the act was done. The purposes of men can be determined only by their declarations and acts, and when one evinces a purpose to harm another, and does it when opportunity offers, it is rational to ascribe his act to his previously formed purpose, — to regard it as the consummation of his design, and to deal with him as having done what he had planned, not permitting him to shield himself by mere provocation which supervened. The safety of society requires that he who is bent on mischief and revenge shall not escape the just consequences of his unlawful acts, merely because of some provocation by his victim while he is in pursuit of his unlawful purpose. One may have ill-will towards another, and yet have no desire or purpose to kill him, or to do him any bodily harm. If a person who kills another acts in truth from malice, and makes the appearance of necessity for his own defence the pretext to execute his purpose of revenge, he is guilty of murder; for malice is not to be covered by a pretence. If one designing to harm another seeks and brings about an altercation in order to accomplish his purpose, he cannot claim that the killing of his adversary shall be reduced to manslaughter because of a provocation, which, under other circumstances, would so reduce it. One cannot create a necessity for an unlawful purpose, and justify his action by the necessity thus created. But if A bears malice towards B, and they meet casually, and B assaults A, and he shoots B, the rule of referring the motive to the previous malice will not apply. A mere grudge, or malice in its general sense, is not sufficient to bring a case within the principle that, where one having express malice towards another kills that other, the killing is referable to the previous malice and not to a provocation at the time of killing. To do this, there must be a particular and definite intent to kill, so that the provocation is a mere collateral circumstance, the intent to kill existing before and independently of it. *State v. Johnson*, 2 Jones (N. C.), 247. It is for the jury to say whether the act of killing proceeded from a deliberate purpose previously formed to kill, then and there carried into effect in pursuance of the previous concerted design, or whether the act was done because of the present circumstances, without



regard to the previous design. If a killing proceeds from a wicked intent previously entertained, and upon a pretext as a cover for such intent then acted on, the killing is referable to the previous intent and is murder.

The tenth instruction was drawn from the language of the opinion of the court in *Riggs v. State*, 30 Miss. 635. In that case, the effort was to reduce the grade of the killing from murder to manslaughter. There was evidence of an altercation terminating in a fight, and the death of one of the parties by the hand of the accused, who was shown to have had a previous grudge against the party killed, and to have threatened to kill him, and to have concealed on his person a weapon upon the approach of his adversary. It was justly held that a mere provocation at the time of the killing did not free the party from the guilt of murder. The use of the word "provocation" in the tenth instruction was calculated to mislead. The killing in this case was either an assassination upon lying-in-wait, or it was in self-defence. There is no hint in the evidence of any provocation, in the legal or popular sense of that term. The instruction must have been understood as conveying the idea that, if the accused had malice towards Martin, he was denied the right to kill in self-defence, which is not true.

Whatever be a man's feelings towards another, he is not required to submit to be killed by him. He is not deprived of his right of self-defence. His right, in that respect, is the same as that of any other person. He may not seek a pretext to gratify his malice. He may not engage in a contest in order to gratify it. But when attacked he may defend himself, even to taking the life of his assailant if that is necessary to his defence, provided he did not invite the attack in order to furnish an occasion to slay his adversary. As was said in *Riggs v. State, ubi supra*, "a previous threat or grudge is evidence of express malice, and it goes to fix the character of the killing afterwards perpetrated, unless circumstances be shown to alter or mitigate it, and to relieve it from the imputation of malice." The office of evidence of a previous "grudge" is to fix the character of the killing as malicious, and therefore murder, if the circumstances of the killing do not relieve it of

this imputation. The value of the evidence is to be determined by the jury.

In this case, there was no altercation between the parties, — no blow, or “provocation,” at the time of the act of killing, but either a lying-in-wait and shooting down of Martin by the accused, who had posted himself under cover to do this, as contended by the State, or a shooting by the accused to keep from being shot, as he insists. If the accused stationed himself where he was, armed with a gun, for the purpose of killing Martin when he should come within range of the gun, and resolved to do so at all events, or on the pretext of a demonstration against him by Martin induced by his acts, and he killed Martin under these circumstances, he cannot shelter himself under the necessity which his own conduct created to kill Martin in order to keep from being killed. But the fact that the accused entertained ill-will towards Martin, or had made threats against him, did not deprive him of his right to defend himself if he was not determined to kill Martin, and did nothing to provoke a hostile attack by Martin, but was attacked by him and he shot him only to protect himself from great personal injury then about to be done him, as indicated by the present hostile demonstration by Martin, and not from a previously formed purpose to do it.

In view of the extremely liberal instructions given at the request of the accused, and the difficulty of discovering how any injury could have been done him by the tenth instruction for the State, we might not reverse the judgment but for the action of the court in refusing a new trial, because of the fact that McAllister, one of the jurors who was accepted and tried the case, had prejudged it unfavorably to the accused, but on his *voir dire* had stated that he had not formed or expressed an opinion as to the guilt or innocence of the accused, who at that time, was ignorant that he had prejudged the case unfavorably to him. It is well settled that this is good reason for a new trial. We are aware of the vulnerability of verdicts on this ground, and of the danger to which it exposes them, especially at this time; and, if the court below had disbelieved the evidence of the charge that the juror had prejudged the cause, we should concur and affirm the judgment on this point; but,

instead of that, the bill of exceptions shows that the circuit judge expressly stated that he assumed as true that the juror had expressed an opinion of the case unfavorable to the accused, and on this assumption the new trial was refused. This was error, for which the judgment must be reversed.

*Judgment reversed, and cause remanded.*

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J. T. HENDRICKS ET AL. v. N. T. PUGH, ADMR., ETC.

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1. **STATUTE OF LIMITATIONS.** *Plea. Practice. Supreme Court.*  
The defence of the Statute of Limitations, in bar of an appeal, is not available, unless pleaded, in the Supreme Court.
2. **SAME.** *Decedents' estates. Erroneous insolvency decree. Reversal.*  
The heir cannot, on reversal of a decree of insolvency simply erroneous as to him, plead, against creditors of the estate, the statutory limitation, which accrued after the decree.
3. **ESTATES OF DECEDENTS.** *Probate Court. Void process.*  
A summons to appear on a past day gives no jurisdiction, and a probate decree for the sale of land, based thereon, is void.
4. **SAME.** *Insolvency. Infants. Notice.*  
Minor heirs were not entitled to notice of insolvency proceedings in the Probate Court. *Burrus v. Burrus*, 56 Miss. 92.
5. **SAME.** *Defective service of process. Decrees void and voidable.*  
Defective service of process rendered a decree of insolvency erroneous and voidable, but not void.
6. **CHANCERY JURISDICTION.** *Probate Court decree. Execution thereof.*  
The Chancery Court must, on the administrator's application, execute a probate insolvency decree, only erroneous as to a party who has not appealed.
7. **SAME.** *Erroneous probate decree. How corrected.*  
The Chancery Court cannot, on such application, vacate such decree for error therein, which can be reached only by reversal or bill of review.

**APPEAL** from the Chancery Court of Yazoo County.

Hon. E. G. PEYTON, Chancellor.

*Hudson & Hudson*, for the appellants.

1. The decree of 1866 for the sale of the land was void, because the writ could not be returnable on a day passed. The decree of insolvency in 1868 was also void for defective service

of process. Code 1857, p. 429, art. 21; *Hammond v. Olive*, 44 Miss. 543; *Foster v. Simmons*, 40 Miss. 585; *Brown v. Levee Commissioners*, 50 Miss. 468; *Jack v. Thompson*, 41 Miss. 49; *Hargus v. Bowen*, 46 Miss. 72; *Root v. McFerrin*, 37 Miss. 17; *Ingersoll v. Ingersoll*, 42 Miss. 155. Process from the Probate Court was required to be executed in the same manner as from the Circuit Court. *Mundy v. Calvert*, 40 Miss. 181; *Martin v. Williams*, 42 Miss. 210. Decrees of the Probate Court void as to part of the defendants are void as to all. *Martin v. Williams*, *ubi supra*. Notice to the infant is essential. The counsel contended that the decision in *Burrus v. Burrus*, 56 Miss. 92, was erroneous, and asked the court to reconsider and recall the ruling, and filed an elaborate argument on the point reviewing all the legislation and reported cases bearing thereon. As to process to minors they cited *M'Allister v. Moyer*, 30 Miss. 258; *Stanton v. Pollard*, 24 Miss. 154; *Georgia Lumber Co. v. Bissell*, 9 Paige, 225; *Reed v. Rice*, 2 J. J. Marsh. 44; *Carrington v. Brents*, 1 McLean, 167; *Combs v. Young*, 4 Yerger, 218; *Erwin v. Carson*, 54 Miss. 282.

2. The Chancellor had power to vacate the former decrees by his decree of 1877, because he was sitting to review the pending case, but his order in 1879 annulling that of 1877 was *coram non judice*, because the decree attempted to be annulled was a final decree, terminating the suit. The lands had never been sold, and no rights of third persons were involved under the decrees of 1866 and 1868, but much remained *in fieri*. The distinctions between a final and an interlocutory decree are drawn in the following cases: *Cook v. Bay*, 4 How. 485; *Bankston v. Bankston*, 27 Miss. 692; *Goff v. Robins*, 33 Miss. 153; *Harris v. Fisher*, 5 S. & M. 74; *Stubblefield v. McRaven*, 5 S. & M. 130; *Jones v. Coon*, 5 S. & M. 751; *Austin v. Lamar*, 23 Miss. 189; *Carmichael v. Browder*, 3 How. 252. As to what is a final decree, see *Stebbins v. Niles*, 13 S. & M. 307; *Cole v. Miller*, 32 Miss. 89; *Sagory v. Bayless*, 13 S. & M. 153; *Person v. Nevitt*, 32 Miss. 180; *Commercial Bank v. Lewis*, 13 S. & M. 226; *Pattison v. Josselyn*, 43 Miss. 373.

3. All remedy in execution of the insolvency decree, and that for sale of the land, if they were final, was barred before 1879 by the lapse of the statutory period, and the decree of

that year was clearly erroneous. It could not vitalize a void decree or improve a voidable one. If intended as an original decree, it was void, because the debts were all barred before 1879. The appeal from the decree of 1879 has been taken in time. It is unnecessary, therefore, for this court to review the decrees of 1866 and 1868.

*Robert Bowman*, for the appellee.

1. Appeals from Probate Court decrees are allowed only within three years after the rendition thereof. Code 1857, p. 430, art. 28. The prescribed time is a limitation of the Supreme Court's jurisdiction. *Kramer v. Holster*, 55 Miss. 243. Appeals which are not matters of constitutional right, but creatures of the statute, must be taken in the time and manner prescribed by the statute. *Hardaway v. Biles*, 1 S. & M. 657; *Porter v. Grisham*, 3 How. 75. This court cannot, therefore, set aside the decrees of 1866 and 1868 as to the adult heir.

2. The decrees for the sale of the land and of insolvency cannot be set aside as to the minor, because no service was necessary, *Burrus v. Burrus*, 56 Miss. 92; nor as to the executor, because he procured the decrees on his sworn petitions. By the decree for the sale of the land, the interest of the heirs was divested, and it was useless to summon them in the insolvency proceedings. Neither decree is void; and, if either is erroneous, it is binding until reversed on appeal by a party affected by the error.

3. By Code 1857, pp. 449, 450, arts. 101, 102, 103, suits against insolvent estates are prohibited. The creditors obtain judgments in the insolvency proceedings. *Winn v. Barnett*, 31 Miss. 653; *Holman v. Fisher*, 49 Miss. 472. None of the claims were barred at the date of the declaration of insolvency in 1868. The claims remain, therefore, in full force.

*W. P. Harris*, on the same side.

1. This court, after appeal from the decree of insolvency and sale is barred by lapse of time, cannot, under pretext of reviewing an order to execute the decree, review the decree itself. The order of sale, which was made before the decree of insolvency, was adopted thereby. It could be made as well before as after the decree, and was only a step in the insolvency suit. Of the three parties to the insolvency decree,

all are bound thereby. The executor procured it, the adult heir is barred of his appeal, and the infant was not entitled to notice. *Burrus v. Burrus*, 56 Miss. 92.

2. One thing is clear. Land is here charged with unpaid debts exceeding its value; and the appellants' plain object is to escape the debts while they hold the property. Certainly, this court has vigor enough to direct new proceedings or new citations if any error is found. It cannot be decided that it is impossible to rectify the proceedings and impossible to do justice. The court must find a way out of this Serbonian bog.

CHALMERS, J., delivered the opinion of the court.

J. T. Hendricks executor of W. W. Hendricks, deceased, sought and obtained authority from the Probate Court of Yazoo County, in November, 1866, to sell the lands of his testator for the payment of debts. An abortive attempt to carry out the decree was made, but the sale was not effective, because of the inability of the purchaser to comply with the terms of his bid. In 1868, the executor presented another petition to the court, reciting the former proceeding; representing that, owing to the increase of the debts and the rapid decline in the value of the land, the entire estate had now become insolvent; and praying that it might be so declared, and be administered as such. On March 23, 1868, a decree of insolvency passed, and the land was ordered to be sold. The heirs of the testator who, besides the executor, consisted of one adult and one minor son, were made parties both to the proceeding for sale to pay debts, and to the insolvency proceeding; but the return of process in both cases was defective. The executor took no steps to execute the decrees of sale; and, for his failure in this regard, as well as on account of his insufficient bond, he was, on petition of the creditors of the estate, removed from office by the Chancery Court, as the successor of the Probate Court, and N. T. Pugh was appointed administrator *de bonis non cum testamento annexo*, on April 17, 1877. Pugh at once sought authority from the court to execute the decrees of sale granted to his predecessor; but the Chancellor, being of opinion that these decrees were void because of the insufficient service of process on the heirs, refused to grant

the authority, and on April 18, 1877, entered an order, vacating and annulling them. Two years later, to wit, in 1879, Pugh renewed his application for leave to execute these decrees, or for a new decree of insolvency; and the decision of this court in the case of *Burrus v. Burrus*, 56 Miss. 92, having then been announced, to the effect that no notice to minors was necessary in Probate Court sales, the Chancellor reversed his former ruling, and ordered the administrator to proceed to execute the decree of insolvency by a sale of the lands. From this order the heirs have appealed; and, upon their request, by order of the court below, this appeal is made to relate back so as to embrace the decrees of 1866 and 1868.

It is argued by counsel for the appellee that the appeal cannot bring these decrees into review, because, more than three years having elapsed since their rendition, an appeal therefrom is barred by the Statute of Limitations. But, no plea of the statute having been filed in this court, this objection cannot be noticed. It is evident from the record, and from the arguments of counsel here, that the whole struggle in this case is to avoid on the one hand, and to apply on the other, the Statute of Limitations to the debts due by the testator.

The heirs contend that the decrees of 1866 and of 1868 were void, and that no new decree for the sale of the land can now be rendered, because the debts against the estate are now barred. The administrator as the agent of the creditors, accepting this theory of the law, strives to show that those decrees are valid, and that he should now be allowed to execute them in order to cut off the plea of the Statute of Limitations which would be urged against a new proceeding. The truth lies between them. The decree of 1866 was a nullity, because the heirs, by a writ issued on Aug. 31, were cited to appear on Aug. 22, and upon the return of this writ, decree *pro confesso* was taken on Nov. 1. The writ which summoned the parties to appear at a day in the past could give the court no jurisdiction.

But the decree of insolvency in 1868 was not void; it was simply erroneous as to one of the heirs, to wit, W. A. Hendricks, the adult defendant to the petition, as to whom the sheriff returned that he had executed the writ "by leaving a true copy at his place of residence, he being absent." The de-

decree was, of course, binding on the executor who was himself an heir, he having procured it. It was binding also upon the minor heir, though defectively served, because, upon the doctrine of *Burrus v. Burrus*, 56 Miss. 92, he was not entitled to any notice whatever. When therefore, the administrator with the will annexed asked for authority to execute this decree, the court below was bound to accord it. The decree being simply erroneous, and not void (and erroneous only as to one of the heirs), the Chancery Court could not in this manner sit in judgment upon the erroneous rulings of the Probate Court, which, until reversed by this court or attacked by bill of review, were conclusive between the parties; and its order of April 18, 1877, by which it assumed to vacate and annul the decree of insolvency, was utterly null and void. It follows, therefore, that the order of March 28, 1879, directing the administrator to execute that decree was correct from the standpoint of the court below. But the appeal to this court brings into review before us the correctness of the decree of insolvency, and that decree, as we have seen, was erroneous, because of the insufficient service on the adult heir, W. A. Hendricks. It must therefore be reversed, but this does not necessitate the institution of a new proceeding. The heirs, who are now in court, will have the right to make any defence to it that was available at the date of the former decree. They cannot interpose against the creditors a bar of the Statute of Limitations, which has accrued since that time. The creditors were not parties to the insolvency proceeding; they had no part in procuring the erroneous decree, nor any right to appeal from it. That decree was not only not void, but it was perfectly good until appealed from, and reversed here. The creditors not only had a right to rely, but were forced to rely, upon the validity of the decree up to this moment, when for the first time by this decision it is rendered invalid. Being only erroneous and not void, it was good so long as the sole heir who was imperfectly served with process acquiesced in it, and the creditors had no intimation that he was dissatisfied with it until this appeal was prosecuted. Being voidable only at the instance of the heir, and binding upon him, except upon appeal, the creditors could not prosecute their claims against the estate with this



decree of insolvency unreversed and unappealed from, nor had they any power to invoke the judgment of this court upon its validity. The heir, therefore, cannot be permitted to set up against them the lapse of time to which by his inaction he has forced them to submit. By the institution of the insolvency proceeding, followed by a decree of the court adjudging the estate insolvent, the creditors were prevented from bringing suits; and, while thus prevented, the Statute of Limitations will not run against them.

The decretal order of March 28, 1879, whereby the administrator was ordered to execute the decrees of sale of 1866 and 1868, is reversed. Said decrees of 1866 and 1868 are also reversed; and the court below, all the parties now being in court, will proceed to pass upon the question of the insolvency of the estate, under the proceeding instituted for that purpose on February 25, 1868, with leave to the administrator *de bonis non* to prosecute the same in his own name, and with leave to the heirs to make answer thereto within thirty days of the filing of the mandate of this court in the court below, the costs of this appeal to be equally divided. *So decreed.*

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THOMAS H. ALLEN v. THE BOARD OF LEVEE COMMISSIONERS.

1. EMINENT DOMAIN. *Jury of inquest. Certiorari.*

*Certiorari* lies to bring up for review the proceedings of an inquest assessing damages under § 17 of the act of Nov. 27, 1865 (Acts 1865, p. 62), for the taking of land for the purpose of constructing a levee on the Mississippi River.

2. SAME. *Certiorari Verdict. Amendment. Circuit Court.*

The Circuit Court cannot, in such case, amend the verdict of the jury, so as to show the improper principles on which it was based, and enable the land-owner to sue for damages on grounds not embraced therein.

3. SAME. *Power of revisory court. Reinvestigation of facts.*

The clause of the statute declaring the verdict final, prevents a reinvestigation of the facts, on return of the *certiorari*, but not an examination of the record.

4. *SAME. Record of inquest. Compliance with statute.*

The record of the proceedings of the inquest must show a strict compliance with the statute.

5. *SAME. Judgment in revisory court.*

The only judgment which the revisory court can pronounce is of affirmance, if the proceedings are correct ; if otherwise, that they be quashed.

ERROR to the Circuit Court of Washington County.

Hon. B. F. TRIMBLE, Judge.

SECT. 17 of the act incorporating the board of levee commissioners, approved Nov. 27, 1865 (Acts 1865, p. 62) provides that, when any owner of lands shall object to the building of a levee thereon or claim compensation for damage he may sustain in consequence thereof, the president of the board of levee commissioners, or such owner, may apply by written petition to the clerk of the board of police of the county, who shall forthwith issue an order to the sheriff "commanding him to summon instantly a jury of twelve disinterested freeholders or householders, resident of the county, to go upon and review the premises and inquire of the damages sustained and the compensation" due such land-owner ; that the jury after five days' notice of the time and place of meeting, having been sworn by the sheriff, "shall render their verdict and inquisition in writing, which shall be returned by the sheriff to the clerk of the board of police, and such verdict and inquisition shall be final between the parties."

*Nugent & McWillie*, for the plaintiff in error.

1. Under the statute (Acts 1865, p. 62), there is no appeal from the verdict, even when it is unjust or oppressive. The Circuit Court, however, has, by the common law, jurisdiction by *certiorari* to revise the judgments of all inferior tribunals. *Holberg v. Macon*, 55 Miss. 112. If the proceedings have not conformed to the statute, they will be annulled, or made to conform to the facts of the case. The office of a *certiorari* is to bring up for review final determinations of inferior tribunals exercising judicial functions, where there is no appeal, nor any plain, speedy, and adequate remedy for errors.

2. The revisory court will examine the evidence to determine whether there was any competent proof of the facts

necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated. *People v. Bush*, 40 Cal. 344; *People v. County Judge*, 40 Cal. 479; *In re Carlton Street*, 20 Wend. 685; *People v. Assessors of Albany*, 40 N. Y. 154; *Swift v. Poughkeepsie*, 37 N. Y. 511; *People v. Smith*, 45 N. Y. 772; *In re New Jersey Railroad Co.*, 1 Harr. 393; *Walbridge v. Walbridge*, 46 Vt. 617; *Hopkins v. Folger*, 60 Maine, 266; *Letcher v. Letcher*, 50 Mo. 137; *People v. Board of Police*, 39 N. Y. 506; *Wilson v. Lowe*, 7 Cold. (Tenn.) 158; *Crawford v. Scio*, 22 Mich. 405; *Phillips v. Phillips*, 8 Hals. 122; *Groenvelt v. Burwell*, 1 Salk. 263; 1 Arch. Pr. 229.

3. The statutory provisions, in these extraordinary cases of the exercise of the right of eminent domain, must be strictly pursued, and compensation must be paid the owner before his eviction. Permitting the president of the levee board to move for the inquest is so unfair to the owner, that this statute is not constitutional. The verdict is based on erroneous principles, and the proceedings are not in conformity with the law. *Cooley Const. Lim.* 528, 581, 561, 563, 564, 568; *Stanford v. Worn*, 27 Cal. 171; *Buffalo Bayou Railroad Co. v. Ferris*, 26 Texas, 588; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Brown v. Beatty*, 34 Miss. 227; *Isom v. Mississippi Central Railroad Co.*, 36 Miss. 300; *Sater v. Burlington Plank Road Co.*, 1 Iowa, 886; *People v. Tallman*, 36 Barb. 222; *Boonville v. Ormrod*, 26 Mo. 193; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; *Powers v. Bears*, 12 Wis. 213; *Shephardson v. Milwaukee Railroad Co.*, 6 Wis. 605.

*Percy & Yerger*, for the defendant in error.

1. The Circuit Court had no jurisdiction to grant the relief sought by the plaintiff in error. The statute provides that the verdict shall be final. In no sense can the jury of inquest be regarded as an inferior tribunal within *Holberg v. Macon*, 55 Miss. 112. When the State, in exercising its right of eminent domain, has provided a remedy whereby the compensation may be assessed, the constitutional requirement is satisfied, *Cooley Const. Lim.* 360; and the right of appeal may be taken away. *Ib.* 384. If this verdict can be reviewed in the Circuit Court, the plain words of the statute are violated.

2. If the proceeding is reviewed, however, no error is apparent therein. The several steps are in strict accordance with the statute, and the verdict follows the form prescribed in the writ. The Circuit Court, on *certiorari*, can only review the record, in which nothing indicates that the jury proceeded on improper principles. To establish the proposition by oral testimony contradicting the verdict would be incompetent. Lands in the levee district are valueless without levees, the necessity to build which may arise at any time, and be so urgent as to admit of no delay. The proceeding to condemn property essential thereto must be speedy, in order to be effectual.

GEORGE, C. J., delivered the opinion of the court.

The plaintiff in error filed his petition in the Circuit Court for a *certiorari* to bring up the record of the proceedings of an inquest assessing damages for the appropriation of his land to the construction of a levee on the Mississippi River. The petition charges that the jury made their assessment on improper principles, but that this is not ascertainable from the form in which the verdict was drawn up; and the prayer is that the writ be granted, in order that the verdict may be amended so as to show the true ground upon which it is based, so that the petitioner may bring an action for the damages he sustained upon other and distinct grounds from those embraced in the verdict.

The demurrer to the petition was properly sustained. The writ of *certiorari* brings up the record of the proceeding sought to be reviewed, and enables the court into which it is returned to inspect the record, and determine from that alone, whether there is any just ground to disturb the proceeding sought to be reviewed. It was formerly held that the reviewing court could decide alone, as to whether the inferior tribunal had acted with regularity and within its jurisdiction. 2 Wait's Actions and Defences, p. 139, § 5. But a more liberal doctrine has prevailed in some States in later years, allowing the reviewing court to decide upon questions arising from the evidence appearing in the record. *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444; *People v. Smith*, 45

N. Y. 772; *People v. Board of Assessors*, 39 N. Y. 81; *People v. Assessors of Albany*, 40 N. Y. 154. But we are not aware that any court has gone further than this, except the Supreme Court of Delaware, which has held that evidence might be introduced outside the record, to show the nature of the cause of action or defence. *Cullen v. Lowery*, 2 Harr. 459; s. c. 2 Harr. 292.

In this case, however, it is insisted that a *certiorari* will not lie to revise the proceedings of the inquest, because the statute under which they took place declares that the verdict shall be final. We do not regard this provision as prohibiting a *certiorari*, but only as preventing a reinvestigation of the facts upon a return of the writ. This view was sustained in England under a similar provision. 2 Chitty Pr. 219, citing *Rex v. Jukes*, 8 T. R. 536, 544; *Rex v. Cashiobury*, 3 Dowl. & Ry. 35. This writ is a highly beneficent and important remedy, and it should be allowed in all cases like this, when summary proceedings for the condemnation of property of great value are authorized by the statute, and no other available remedy to review them is permitted. The powers granted to the jury of inquest are very extraordinary, and may be exercised as against a non-resident of the county, without other notice than assembling on the land to be condemned. All questions of law and fact are submitted to the sole judgment of the jury, without any provision to insure a correct result other than their unaided judgment. The only protection that the land-owner has is in confining the jury and all the officers charged with any duty in respect to the inquest strictly within the limits of the power conferred, and to an exact observance of all the provisions of the statute under which they act. As there is no means given in the statute by which a non-observance of its requirements can be excepted to, and made a part of the record, it is essential that the record itself should show affirmatively that the statute was strictly complied with.

We cannot now look into the record of the proceedings, though a copy of it was filed with the petition. That can be done only when the record is returned with the writ. So we are unable to decide upon the questions presented by it,

and discussed in the brief filed for the plaintiff in error. As the sole object of the petition was to have the verdict amended, which cannot be done, we affirm the judgment. The petitioner may proceed again in the regular way, and on the return of the *certiorari*, may have the proceedings fully reviewed. If they are found correct, the proceedings of the inquest will be affirmed; otherwise, they will be quashed, these being the only judgments which the revising court can pronounce.

*Judgment affirmed.*

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R. F. SHANKS ET AL. v. TOWN COUNCIL OF GREENVILLE,  
USE, ETC.

1. LEVY ON TENANT'S GOODS. *No apportionment of rent.*

When chattels on leased premises are seized by the tenant's creditor, the landlord, by virtue of Code 1871, § 852, is entitled to receive the rent for all the time contracted for, not exceeding one year, whether the day of payment has come or not.

2. SAME. *Liability of sheriff.*

The officer, who makes the levy, is liable, if he takes the property without paying or tendering the landlord the rent.

ERROR to the Circuit Court of Washington County.

Hon. B. F. TRIMBLE, Judge.

In this suit against R. F. Shanks and the sureties on his official bond as town marshal and constable, the declaration alleged that an attachment for rent due, and to become due monthly, sued out, on April 12, 1876, by the defendant in error against the usee's tenant, Adolph Heidingsfelder, who held under a lease for one year from Nov. 15, 1875, to Nov. 15, 1876, was placed in the hands of said constable, who levied on goods upon the demised premises, took and sold the goods, and failed to pay over the proceeds. The defence pleaded was that, prior to the issuance of the attachment for rent, an attachment for debt had been levied by the constable on the same goods, which, after judgment against Heidingsfelder, were sold under *venditioni exponas*, and that,

after tendering the landlord the rent, which had then accrued and become due, he paid the balance to the attaching creditor. A demurrer, on the ground that the plea failed to show the tender or payment of one year's rent, was sustained.

*Percy & Yerger*, for the plaintiffs in error.

1. If goods are seized upon demised premises under execution or attachment, sold by the officer and the proceeds paid to the creditor without the rent having been first paid or tendered to the landlord, under Code 1871, § 852, the officer who makes the seizure and sale is not liable to a suit by the landlord, but the judgment creditor, both by the language of the statute and on sound reason, is alone liable. The officer can be sued in trespass by the owner of the goods alone. The landlord, who has not even a lien on the goods, must sue the creditor, who has received the rent properly due to him. *Stamps v. Gilman*, 43 Miss. 456; *Marye v. Dyche*, 42 Miss. 347.

2. The statute refers exclusively to rent "due;" and, if that word is to be taken in its ordinary sense, the demurrer should have been overruled. In Code 1871, ch. 21, on Landlord and Tenant, the word is frequently used (§§ 1620, 1622, 1623, 1629, 1633), and always in the sense of rent "in arrear." By the words "whether the day of payment by the terms of the lease shall have come or not," the right was preserved to the landlord to subject his tenant's goods to the payment of such part of the rent as had accrued, provided it did not exceed one year's rent. Whatever may be the day of payment fixed by the contract, when an execution is levied the statute makes an apportionment of the rent, and requires the payment of the part then due. The intent of the statute is to secure the landlord rent to the extent to which his property has rendered service. And the object of the one year's limitation is to enforce diligence, on the part of the landlord, in collecting his rent in arrear. Under the statute of 8 Anne, ch. 14, § 1, which is the prototype of the American statutes, the landlord could claim only the rent due at the time of seizure. *Hoskins v. Knight*, 1 M. & S. 245. In New York, under a similar statute, in a case like this, he was held entitled only to the rent due to the end of the last quarter preceding the seizure.

*Hazard v. Raymond*, 2 Johns. 478. The same rule is established in Alabama, *Denham v. Harris*, 13 Ala. 465, and approved in Smith on Landlord and Tenant, 147 and note.

*Frank Johnston*, for the defendant in error.

1. The action for damages was maintainable against the officer levying the attachment for debt. Taylor on Landlord and Tenant, § 604; *Phillips v. Bacon*, 9 East, 298.

2. By the English decisions, only the rent in arrear was allowed the landlord. *Hoskins v. Knight*, 1 M. & S. 245; *Harrison v. Barry*, 7 Price, 690. Alabama and New York, with statutes like that of 8 Anne, ch. 14, § 1, have followed the English rule. Smith on Landlord and Tenant, 147, note; *Denham v. Harris*, 13 Ala. 465; *Hazard v. Raymond*, 2 Johns. 478. But Code 1871, § 852, adds to the English statute the words "whether the day of payment by the terms of the lease shall have come or not." The word "due," when taken in connection with that clause, must mean "owed." A debt is often said to be due from a person owing it and primarily bound to pay, although the time for payment has not come. Burrill's Law Dic. word "Due;" *United States v. State Bank*, 6 Peters, 29, 36. The intent of the statute is to protect a year's rent, at least, for the landlord. There is no sanction for the proposition that the words create a rule of apportionment. Had such been the design, it was easy to express it by proper language. Apportioning rent is incompatible with this subject. A lease is an entire thing, as is also the rent, which does not accrue from day to day like interest.

GEORGE, C. J., delivered the opinion of the court.

Two questions are presented for determination: First, whether under Code 1871, § 852, the landlord is entitled to have paid to him, by a creditor of the tenant levying on his goods, the whole amount of rent which the tenant then owes by the terms of the lease, whether overdue or not, provided it does not exceed one year's rent; or whether he is entitled only to have so much of the rent, in case it is not due at the time of the levy, as would be due for the time of occupancy of the tenant if the rent for each day was payable at the end thereof. Second, whether, in case of failure to pay the rent, the officer



taking the goods or only the creditor is liable. The word "due," in the phrase of the statute, "all money due for the rent," means the same as "owed;" and the landlord is entitled to receive all the rent which by the terms of the lease is contracted to be paid by the tenant, not exceeding, however, one year's rent; and he is entitled to this without reference to whether the day of payment of the rent has come or not. The officer making the levy is liable, if he removes the goods without paying or tendering the landlord the rent.

*Judgment affirmed.*

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EDWARD H. LOMBARD v. JOHN S. LOMBARD.

57	171
577	197
577	288

1. WIDOW. *Dower. Collateral heirs.*

The widow of a childless intestate is, under Code 1871, entitled to but half his estate. CAMPBELL, J., dissented. *Gibbons v. Brittenum*, 56 Miss. 232, followed.

2. STARE DECISIS. *Vested rights.*

Where rights have become vested from transactions under the law, as settled by former decisions, the court should depart therefrom, only in case of clear necessity and positive conviction of error.

3. SAME. *Decision by two judges against one. New judges.*

Conflicting provisions of Code 1871 having been after full arguments construed by a divided court of three judges, GEORGE, C. J., succeeding one of the majority, declined to reopen the question, although presented in a new case, while the two remaining judges adhered to their diverse opinions.

ERROR to the Circuit Court of Warren County.

Hon. UPTON M. YOUNG, Judge.

*T. C. Catchings*, for the plaintiff in error, filed a brief and made an oral argument.

The question presented here was passed on in *Gibbons v. Brittenum*, 56 Miss. 232, which the lower court followed, and this case is brought up to obtain, if possible, a different announcement of the law. Subsequent legislation renders the rule inapplicable, except as to estates of persons who previously died. Hence the reasons on which the doctrine of

*stare decisis* is founded have no application here, and the court is at liberty to overthrow its former ruling, if it shall be found that it was made upon an erroneous conception of the law. Full effect can be given to the various provisions of the Code, pertinent to the questions involved, because no inconsistency exists; or, if any, the widow can elect under which statute she will take.

The several statutes being adopted together must be considered together, and any construction which will sustain them all must be given. If inconsistent in part, they must be sustained in a modified form. Failing to maintain them all, it may be admissible to regard the latter as modifying those first adopted, which will be upheld as modified. Sect. 1788 was inserted by the legislature which deliberated on the subject, rejecting in part the scheme presented by the codifiers, and substituting a complete one of its own as to dower, with the purpose not of decreasing the widow's rights, but of making them greater. The effect of the decision in *Gibbons v. Brittenum*, *ubi supra*, is to defeat that intention, and to lay down a rule which can only create confusion; as, for instance, classes of property not included in § 1281 are embraced in § 1788. If, as decided, the former repeals the latter, as to property of which the husband "died seised" the widow takes half, but as to other property she takes all. Under § 1788, the whole estate is subject to debts, and a voluntary conveyance defeats the widow; but § 1281 secures her one-third of the estate, notwithstanding the husband's liabilities or voluntary deed. The two sections do not conflict, but may stand together, each performing an important function. If, however, the sections are irreconcilable, the widow, having two inconsistent rights, must make her election. *Robertson v. Stevens*, 1 Ired. Eq. 247; *Johnson v. Smith*, 1 Ves. 314; *Pugh v. Smith*, 2 Atk. 43; *Morris v. Barroughs*, 1 Atk. 399; Bouvier's Law Dic., title, "Election." She can take, under § 1788, all her husband's property subject to his debts, or, under § 1281, a liberal dower.

*Frank Johnston*, on the same side, argued orally, and filed a brief.

Sects. 1281 and 1788, Code 1871, can both stand. They relate to different subjects, and have in many cases distinct

operations. Although § 1281 provides for a moiety in fee, it is none the less an estate held by the tenure of dower. 2 Black. Com. 129; 4 Kent Com. 87; 1 Bish. on Married Women, § 243; *Bridgeforth v. Maxwell*, 42 Miss. 743. It has been so held under like statutes in Florida, *Smith v. Hines*, 10 Fla. 258; in Missouri, *McLaughlin v. McLaughlin*, 16 Mo. 242; in Illinois, *Boyles v. McMurphy*, 55 Ill. 236; and in Iowa, *Barnes v. Gay*, 7 Clarke, 26; *Burke v. Barron*, 8 Clarke, 132; *Cain v. Cain*, 23 Iowa, 31. By the express terms of that section, the dower estate would attach in all lands which had been fraudulently conveyed or alienated by voluntary conveyances of the husband. Such lands would not descend under § 1788. Under § 1281, the widow would take an estate only in such property as she would have had dower in at common law. The will of the husband would defeat her estate under § 1788, while she could take at her election under § 1281. It is equally clear that § 1788 gives her property, in which she could not have had dower at common law, as, for instance, leaseholds and reversions. Sect. 1281 was intended only to give the widow so much as her *dower*, and not to declare that she shall take no other estate by any other tenure or right. It affirmatively gives her dower, and is silent as to the inheritance. Moreover, it has no relation to any statute of descent and distribution. The residuum of the decedent's estate, after the dower has been ascertained, is governed by §§ 1788 and 1948.

The legislature, by § 1281, clearly intended to confer affirmatively some benefit upon the widow. It was not designed to injure her. And yet this court has decided in *Gibbons v. Brittenum*, 56 Miss. 282, that its only effect was to deprive her of all the benefits of § 1788. The same theory of construction, and the same process of reasoning, adopted in that decision, would repeal all that part of the section which gives her one-third of the lands for life. The Code of 1871, as originally submitted to the legislature, did not contain § 1281, or § 1282, relating to dower. On the contrary § 1788 was the only provision made for the widow, and it contained also an express clause *abolishing dower*. The legislature, however, accepting § 1788, re-enacted § 1281, and declared that she

should have all the benefits of the dower statute. This was plainly a declaration that she should have not only what the original Code proposed to give her, but also the benefits of § 1281 ; and there was, evidently, no intention to repeal § 1788 by the addition of § 1281. An affirmative statute does not repeal the prior law in relation to the same matter. 2 Potter's Dwaris, 74 ; *Birmingham v. Birmingham*, 53 Miss. 610.

This purpose of the legislature ought not to be defeated by the court, upon any technical rules of repeal. On the contrary, all technical methods should be used, if necessary, to give effect to what is manifestly the legislative will. There is no inconsistency between the sections which should destroy either. One treats of dower, the other of the general course of descent. Each, in a great variety of cases, has a distinct application. They create estates by different tenures. In a few cases, each creates an estate in the same land ; but this does not repeal either. *Peyton v. Jeffries*, 50 Ill. 143 ; *Ringhouse v. Keever*, 49 Ill. 470 ; *Bresee v. Stiles*, 22 Wis. 120. The widow could claim under both, or elect to claim under either. It is impossible, on any sound rule of construction, that she can lose the larger estate. *Tyson v. Postlethwaite*, 13 Ill. 727.

*Smith & Klein*, for the defendant in error, cited *Gibbons v. Brittenum*, 56 Miss. 282.

GEORGE, C. J., delivered the opinion of the court.

We are now asked to review and overrule the case of *Gibbons v. Brittenum*, 56 Miss. 282, decided at the April Term, 1878, in which a majority of this Court held that, under the provisions of the Code of 1871, the widow of a person dying intestate, and without children or descendants of them, was entitled to one-half only of the estate of her deceased husband. That case was argued twice at the bar, and in the last argument the judges remained of the opinion entertained on the first argument. Chief Justice Simrall, who was one of the majority of the court, having retired from the bench, the present case is brought up, presenting again the identical question involved and decided in the case above mentioned ; and, on an elaborate and learned argument in opposition to the former ruling, Justices Chalmers and Campbell each adhere

to his former opinion. It is thus left to me, if the question be regarded as unsettled, to say whether, by concurring with Judge Chalmers, the former ruling shall be upheld, or, by concurring with Judge Campbell, it shall be overruled. The case of *Gibbons v. Brittenum*, *ubi supra*, on both the original hearing and the rehearing was argued with great ability by the counsel on both sides. It was twice considered by the court; and that this consideration was careful and painstaking is shown by the three opinions read, one being prepared by each judge. It is thus sharply presented to my consideration whether I shall give my assent to the overruling of a decision made by the court upon full argument at the bar, and on the gravest and most mature deliberation by the judges, merely because I may happen to differ from my predecessor as to the correctness of the former ruling. I cannot consent to do this, when the question involved is like the one now in controversy.

That the former decision was made by a divided court rather increases than diminishes the duty to adhere to it, when a departure from it must result alone from my non-concurrence in the views of my predecessor, the other two judges participating in the former judgment adhering to the opinions then formed and expressed by them. Moreover, a majority of this court are invested by the Constitution with all the powers which can be exercised by a full bench. This Court has no distinct substantive power to declare a rule of law. It has power to render judgments, and, as an incident to this power, may, in the exercise of it, declare a rule, which becomes a precedent for similar cases. The power of a majority to render judgments is as ample as is that of the full bench; and necessarily the incidental power of declaring the rule which governs the case must exist also. How much a division among the judges shall detract from the force and authority of the decision as a precedent, it is difficult to define. That a subsequent full bench, all concurring in the impropriety of the first ruling, would depart from it with less hesitancy in cases where a departure is allowable than they would overrule a unanimous decision, is probable. But this does not help the difficulty here; for, if the former decision be over-

ruled, it will be by a majority only, one judge being thoroughly convinced that it is correct. And so, if a ruling by a majority is not to be regarded as settling the law, the overruling of that decision by a mere majority will leave the law in that state of doubt and uncertainty, which is worse than a concededly wrong settlement of it.

The decision we are asked to overrule announces a rule of property; and, though but recently made, it is old enough for persons to have acted on the faith of it. Even at this early day, I should hesitate to disturb it, even if we all agreed that it was clearly erroneous. But the question involved is a very doubtful one. This is evident from the division among the judges, and the different opinions entertained by the bar. I have given it my best consideration, and I cannot say that I am convinced that the former decision is erroneous. The question in its very nature presents inherent difficulties, the extracting of a certain legislative intent from repugnant provisions in a code of laws which went into operation *uno flatu*, and which was prepared for the express purpose of furnishing a body of laws for the people, containing nothing but operative provisions.

Considering the difficulty of the question, and the tenacity with which the late Chief Justice and the Associate Justices adhered on the second argument, each to his opinion as expressed on the first argument; and considering, further, that each of the two judges now on the bench, who participated in that decision, is unshaken in the conclusion he then reached, it would appear that the diverse views so entertained must have resulted in a large degree from the peculiar intellectualism of the judges; and, if I were to form an opinion, it would be reached in the same way. For it seems to be a question incapable of settlement by reasoning, else it is certain that the learned and able arguments at the bar, and the equally able and learned discussion by the judges, would have brought them into unanimity.

It would be a great evil if questions once settled on full argument and mature deliberation were subject to be reopened and decided differently upon every change in the members of this court, and consequent changes in the temper and

mental organism of the judges. Settled rules, so far as they relate to rights of property, on which the people may repose with confidence and security, are essential to the welfare of society. It is impossible to lay down any precise rule, which governs inflexibly a court of last resort, in adhering to or departing from a former decision. It is safe, however, to say that the rule of *stare decisis*, so far as it relates to decisions of this court, should not be disregarded, except on the fullest conviction that the law has been settled wrong; and even then it is better to leave the correction to the legislature in all cases where a departure from it would have the effect to disturb vested rights, resulting from transactions entered into under the law as settled. In such cases, a departure from former rulings should never take place except upon the clearest necessity and the most assured conviction that the former ruling was erroneous. I do not see this necessity here, nor have I that assured conviction.

Speaking for myself alone, I would say that on constitutional questions, where the former decision refused a right reserved to individuals as against the power of the government, or where it impaired the powers of the people or their representatives to prevent maladministration by their officers and agents, or sanctioned an alienation by the legislature of powers conferred for the public good, I should feel little hesitation in departing from it when satisfied of its incorrectness.

The judgment of the court below, being in accordance with the rule laid down in *Gibbons v. Brittenum, ubi supra*, is  
*Affirmed.*

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EX PARTE J. T. BRIDEWELL.

BAIL. *Habeas Corpus. Res adjudicata. Code 1871, § 1418.*

Judgment admitting to bail on a writ of *habeas corpus*, is conclusive of the right to bail only on the facts existing at the time; and on a state of case subsequently arising, as, for instance, the finding of an indictment for murder, the question can be reinvestigated, and, on additional evidence, bail may be refused.

APPEAL from the decision of Hon. Upton M. Young, Judge of the Eleventh District of Mississippi, on a writ of *habeas corpus*, refusing to admit the appellant to bail.

The bond required by the judgment of the Supreme Court in the former *habeas corpus* proceeding, *ante*, 39, was not given, but Bridewell remained in custody until the grand jury found an indictment against him for murder, when he petitioned for the present writ, averring that, having been adjudged by the Supreme Court, on all the proof, entitled to bail, the question of his right was *res adjudicata*. But the District Attorney opposed his enlargement on the mandate of the Supreme Court, because he was prepared to adduce additional criminating facts, which did not exist at the time of the hearing under the first writ; and, notwithstanding the objection of the counsel for the petitioner, the evidence stated in the opinion, as well as the testimony on the former trial, was introduced.

*H. F. Simrall*, for the appellant, argued orally and filed a brief.

1. The judgment of this court at the last term is conclusive of the petitioner's right to be enlarged on bail. At common law in England application could be made to each of the twelve judges in succession, neither of whom would be concluded by the judgment of the others on the same subject-matter. *The King v. Dean and Chapter of Trinity Chapel*, 8 Mod. 27; *Ex parte Partington*, 13 M. & W. 679. The English doctrine has been generally adopted by the American courts. *Bell v. State*, 4 Gill, 301; *Russell v. Commonwealth*, 1 Penn. 82; *In re Perkins*, 2 Cal. 424; *Hurd on Habeas Corpus*, 562. But in some of the States the judgment is put on the same footing as those rendered in other proceedings. It then has the effect of *res adjudicata*, and may be reviewed for error. *Yates v. People*, 6 Johns. 337. Unmistakably such is the effect of Code 1871, § 1413, which, in connection with § 1415, makes such judgments conclusive in the same matter. The last clause of § 1413 reads "nor shall any person so discharged be afterwards confined for the same cause, except by a court of competent jurisdiction." Comparing this with § 1409, it appears plainly inapplicable to this case, because Bridewell was never discharged, nor subsequently confined by any court having jurisdiction to



try the question of his guilt finally under an indictment. The condition of the bond given by one accused of crime, when enlarged on bail, is to appear, from day to day and term to term, to answer such indictment as may be found against him. A new bond is never required in consequence of the indictment, but the old one holds good until the trial.

2. The judgment in a *habeas corpus* proceeding is conclusive both as to law and fact, *Land v. Keirn*, 52 Miss. 341; and precludes the parties to the record from contending contrary to the matter put in issue and determined. *Outram v. Morewood*, 3 East, 346. The point decided on the former writ was that Bridewell was not so implicated in the homicide as to be denied bail, and that adjudication estops him, as well as the State, to reopen the question. If he, on evidence establishing his innocence, discovered after the former trial, could have a new writ and be discharged, or if the State, on proof of his guilt subsequently obtained could, after he had given bond, procure his incarceration, the statute, which makes the decision on the first writ conclusive, would be nullified. The decision now under review proceeded, not on the ground that the finding of the indictment interposed any obstacle or changed the attitude of the case, but upon the idea that the additional testimony imparted to the case a character which it did not bear when first heard. If that is sound, the former judgment was not final. The test is not whether the first suit was actually determined on its merits, but whether the merits were involved and could have been determined in that suit. *Agnew v. McElroy*, 10 S. & M. 552; *Johnson v. White*, 13 S. & M. 584; *McConologue's Case*, 107 Mass. 154; *Spalding v. People*, 7 Hill, 301; *Betty's Case*, 20 Law Rep. 455; *Mercein v. People*, 25 Wend. 64, 99; *Freeman on Judgments*, § 324. The utmost limit to which jurisdiction of a second writ can be carried is to consider a new condition of the applicant's case, which did not exist at the time of the trial of the first, as, for instance, a recent sickness produced by confinement which endangered his life. The matter on which the last proceeding is based must be such that it was not legally involved in the former one. *Ex parte Pattison*, 56 Miss. 161.

3. The testimony on the last hearing does not, however, im-

part a complexion to the case different from that which it had on the first trial, except that it weakens the evidence for the State. In view of the last proof, the petitioner is entitled to be admitted to bail.

*J. D. Freeman* and *J. S. Morris*, on the same side, each made an oral argument.

*T. C. Catchings*, Attorney General, for the State, filed a brief and argued the case orally.

At common law, the finding of the indictment against Bridewell would of itself have justified the court in arresting and confining him, even if he had given bail under the former judgment of this court. As he did not give bail, the court could, of course, hold him. *People v. McLeod*, 1 Hill, 377. The rule making the indictment conclusive of guilt on an application for bail, which was based on the reason that the testimony before the grand jury could not be had, does not exist in this State, where such evidence may be produced, but the presumption of guilt still arises from the indictment, and, in the absence of proof to overthrow it, is sufficient to warrant the imprisonment of the accused. After indictment, the judge who determines the question of bail cannot acquit the prisoner, for that would be to try the case. *Street v. State*, 43 Miss. 1. The indictment which changes the accusation from a suspicion into a solemn arraignment, and makes a trial essential, alters the case, and makes a rearrest proper, unless a different rule is laid down in Code 1871, ch. 12, art. 5. The statute, § 1418, which provides that a party discharged on *habeas corpus* shall not be confined except by a court of competent jurisdiction, was not intended to make the judgment conclusive on the government until indictment, for it was so at common law, but to cut off the right, which the accused had by the common law, to renew his application for bail upon the same state of case before all the judges in succession. This is apparent from the language of the section, which makes the judgment a bar to another *habeas corpus*, or other proceeding, except appeal or action for false imprisonment. The State cannot appeal or sue for false imprisonment. The bar is to another attempt by the accused to get bail on the same state of case. *Ex parte Pattison*, 56 Miss. 161. The right of the State remains as at

common law. Were this not so, a person released by a magistrate could be apprehended, while one bailed on *habeas corpus* would not be subject to arrest. No such anomaly is contemplated by the law. A judgment admitting to bail before indictment is conclusive upon the State until an indictment is found. A new case is then presented; and, in pursuance of its power to bring the party to trial, the court may cause his rearrest. A judgment on the new case admitting to bail would, apart from the statute, be final as to the State, while a determination thereon refusing bail would, because of the statute, conclude the accused in the manner and to the extent therein provided.

*H. C. McCabe*, on the same side, argued the case orally.

*Cowan & McCabe*, on the same side.

The presumption is great that the relator killed the deceased, and that the killing was murder. Const., art. 1, § 8. Of both propositions, the indictment is *prima facie* evidence. The burden of overturning this presumption is upon the appellant. That Bridewell killed Andrews is shown as well by the uncontroverted facts, as by his confessions proved at the last trial. The killing being established, the law presumes that it is murder, in this case, from the finding of the indictment by the grand jury. It is difficult to ascertain upon what theory the defendant puts his justification. No theories except contradictory ones have been advanced as to the *nature* of this killing. If the words and deeds of a man can be evidences of guilt, then we have before us a case of murder. The trial judge had decidedly the advantage of this court in determining the credibility of the witnesses, and his decision on disputed points of evidence ought to be of great weight. Upon the whole record his judgment is correct, and should be affirmed.

CAMPBELL, J., delivered the opinion of the court.

The judgment of this court admitting the appellant to bail was conclusive of his right to bail in the state of case which then existed, but not of his right to bail on a new state of facts since occurring, and presenting a case different from that existing when the former application was made. Our statute,

Code 1871, § 1413, makes the judgment rendered on the trial of any writ of *habeas corpus* a bar to another *habeas corpus* "to bring the same matter again in question;" but the conclusiveness of the judgment is limited to the conditions existing at the time, and does not preclude subsequent inquiry into a new state of case made, not by new evidence of a formerly existing state of case, but by facts occurring subsequently which essentially vary the case, and make it not the same matter before adjudicated. Matters arising subsequently to the prior judgment may be investigated anew, for they have never been decided. All matters of fact which existed and might have been litigated in the former proceeding were concluded by it. The object of the section cited was to confine the applicant for the writ of *habeas corpus* to one proceeding, in the same state of case, and to secure to him the benefit of a judgment in his favor; in other words, to apply the rule of *res adjudicata*, so far as it is applicable, to the judgment on the trial of a writ of *habeas corpus*, with the further provision that a person discharged by such judgment shall not be confined for the same cause, except by a court of competent jurisdiction.

The evil sought to be remedied by the statute was the repetition of proceedings by the writ of *habeas corpus* as often as a judge could be found to grant it, and the remedy given is the denial of more than one writ of *habeas corpus* in the same matter, with conclusiveness given to the judgment, both for and against the relator, but subject to the right of a court of competent jurisdiction to afterwards confine for the same cause a person discharged on *habeas corpus*. A case, so far as the right to bail is concerned, may be a varying one, in which the party, at one time and in one state of case, may not be entitled to bail, and at another time, and in a different state of case, may be entitled to it. While the person is the same, and the offence with which he is charged is the same, a change of circumstances, essentially varying the case, and occurring after a judgment on the trial of a writ of *habeas corpus*, presents another matter for adjudication. It is true the question is the same; viz., Shall the relator have bail? But it is a new matter, because arising out of a new condition of things, which presents the question, whether now, in this new conjuncture,

the prisoner is entitled to bail? *Ex parte Pattison*, 56 Miss. 161; *Mercein v. People*, 25 Wend. 64; *People v. Mercein*, 3 Hill, 399.

The estoppel of a judgment on the trial of a writ of *habeas corpus* operates reciprocally, against and in favor of the relator, so far as to preclude inquiry into the same matter, but not so as to bar the prisoner from obtaining bail upon the occurrence of a new and different condition of things, nor so as to entitle him to bail in a state of case different from that existing formerly. If bail is allowed by a committing magistrate, on an examination, or by a judge on trial of a writ of *habeas corpus*, and subsequently an indictment for murder is found and presented, and the prisoner is arrested and held by virtue of process on such indictment, a new and different state of case is presented, varying materially from that existing before, and open to investigation upon new proceedings. That is the case at bar. Since the adjudication of this court, on his appeal from the judgment of the circuit judge on trial of a writ of *habeas corpus* sued out by him, the appellant has been indicted for murder by the grand jury of Warren County, and is held under that indictment. Additional testimony, not produced on the first trial of the writ of *habeas corpus*, was heard by the judge on the hearing of the present writ, and he refused bail. We are not prepared to say that he erred in this, and his judgment is

*Affirmed.*

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PHILIP G. COCKS v. CROSBY S. SIMMONS ET AL.

1. DECREE. *Infant. Service of process. Recital.*

A chancery decree for the sale of a minor's land cannot be impeached, in a collateral proceeding, if the order appointing a guardian *ad litem* recites that summons was duly executed on the minor, although the only summons shown by the record was served, not on him, but on a person erroneously styled his guardian.

2. SAME. *Service on parent or guardian. Code 1857, p. 489, art. 64.*

Such a recital in the order renders valid, collaterally, a decree of partition, although the summons was served only on the infant, who had no father or guardian living, as shown by the record, which is silent as to his mother.

57	188
78	88
78	227
57	183
183	259
57	183
86	627
286	647
57	183
95	850

3. **RES ADJUDICATA.** *Infant. Negligence of guardian ad litem.*  
An infant defendant is concluded by the decree enforcing a vendor's lien on his land, although he had a title which his guardian *ad litem* failed to assert.
4. **CHANCERY JURISDICTION.** *Partition. Sale of infant's land.*  
A court of equity can order land to be sold for partition among joint tenants, some of whom are minors. *Wilson v. Duncan*, 44 Miss. 642, affirmed.
5. **INFANT.** *Purchase. Estoppel to disaffirm.*  
An infant entitled to an eighth of the purchase-money of land, who, at a sale to enforce the vendor's lien, purchases with the seven others, cannot so repudiate his purchase as to avoid a subsequent sale of the land, made under partition proceedings between the eight purchasers.
6. **DELIVERY OF DEED.** *Evidence. Competency and sufficiency.*  
The delivery of a deed, produced in an action of ejectment by the party who relies thereon, is a question for the jury, and it is erroneous for the court to exclude the deed from their consideration on the ground that it was never delivered.
7. **COMMISSIONER'S DEED.** *Delivery. Report and confirmation.*  
A deed executed and acknowledged by a commissioner, appointed by decree to sell and convey land, is delivered, when the court confirms his report of sale and conveyance, although he retains manual possession of the deed.
8. **SAME.** *Estoppel by record.*  
As against a purchaser, who has paid for and is equitably entitled to the land, parties to the record which contains such recitals are estopped to deny the delivery of the deed.
9. **SAME.** *Injunction Dissolution.*  
If such deed is made under a sale by the court, in violation of the terms of an injunction which has previously issued from the same court, the injunction may be regarded as dissolved, in considering the validity of the purchaser's title.
10. **SAME.** *Violation of injunction.*  
One who is not a party to the injunction bill, cannot complain of such violation of the injunction.
11. **SAME.** *Agreement between counsel.*  
An agreement, between the counsel in the two cases, that the commissioner shall hold the deed and the purchaser enough money to answer the injunction suit, does not prevent the title to the land sold from passing to the purchaser.

ERROR to the Circuit Court of Holmes County.  
Hon. W. COTHRAN, Judge.

*Nugent & McWillie*, for the plaintiff in error.

1. The purchaser is to be considered as contracting with the court by which the sale was made through its agent, the commissioner. *Andrews v. Scotton*, 2 Bland, 629, 642. A collateral attack is allowable only in case the sale is void. *Anderson v. Roberts*, 18 Johns. 515. This cannot be if it is valid as to some persons, but may be avoided at the election of others, or if it is capable of confirmation or ratification. *Boyd v. Blankman*, 29 Cal. 35. That only is void which is done against law, at the very time of doing it, and when no person is bound by the act. Bacon's Abr. title Void; *Anderson v. Roberts*, 18 Johns. 527; *Hahn v. Kelly*, 34 Cal. 891. In case of an attempted service of process, the presumption is that the court considered and determined whether the acts done were sufficient; and the conclusion reached by the court, from hearing and deliberating upon a matter, which it was authorized by law to decide, cannot be void, though erroneous. Freeman on Judgments, §§ 126, 130; *United States v. Arredondo*, 6 Peters, 691; *Reeve v. Kennedy*, 43 Cal. 643; *Campbell v. Hays*, 41 Miss. 561; *Isaacs v. Price*, 2 Dillon, 351; *Kipp v. Fullerton*, 4 Minn. 480; *Cole v. Butler*, 43 Maine, 403; *Hendrick v. Whittemore*, 105 Mass. 23; *Cook v. Darling*, 18 Pick. 393; *Finneran v. Leonard*, 7 Allen, 54; *Joyce v. McAvoy*, 31 Cal. 273; *Dixey v. Laning*, 49 Penn. St. 143; *Wimberly v. Hurst*, 33 Ill. 166; *Day v. Kerr*, 7 Mo. 426; *Hamilton Building Association v. Reynolds*, 5 Duer, 671; *Mills v. Alexander*, 21 Texas, 154; *Hammond v. Wilder*, 25 Vt. 342; *Faulkner v. Guild*, 10 Wis. 563; *Sears v. Terry*, 26 Conn. 273; *Yaple v. Titus*, 41 Penn. St. 195; *State v. Conoly*, 6 Ired. 243; *Sheldon v. Newton*, 3 Ohio St. 494; *Smith v. Smith*, 22 Iowa, 516; *Crutchfield v. State*, 24 Ga. 335; *Morrison v. Austin*, 14 Wis. 601; *Ponder v. Moseley*, 2 Fla. 207; *Whitwell v. Barbier*, 7 Cal. 63; *Thompson v. Tolmie*, 2 Peters, 157; *Wyman v. Campbell*, 6 Porter, 226. The record, which imports absolute verity, and is to be tried by itself, must show affirmatively a want of jurisdiction to make the decree a nullity. Code 1857, p. 542, art. 15; *Hahn v. Kelly*, 34 Cal. 424, 425; *Quivey v. Baker*, 37 Cal. 465; *Hardy v. Gholson*, 26 Miss. 70; *Foot v. Stevens*, 17

Wend. 483; 2 Bur. Law Dic., title Record; 3 Black. Com. 24; *Knight's Case*, 1 Salk. 329; *Croswell v. Byrnes*, 9 Johns. 287, 290. Our own decisions do not militate against the rule. *Gwin v. McCarroll*, 1 S. & M. 351; *Smith v. Bradley*, 6 S. & M. 492; *Foute v. McDonald*, 27 Miss. 610; *Wall v. Wall*, 28 Miss. 413; *Cason v. Cason*, 31 Miss. 578; *Campbell v. Brown*, 6 How. 106; *Cannon v. Cooper*, 39 Miss. 784, and *Moore v. Ware*, 51 Miss. 206. The counsel then reviewed *Winston v. Miller*, 12 S. & M. 550; *Price v. Crone*, 44 Miss. 571; *Ingersoll v. Ingersoll*, 42 Miss. 155; *Johnson v. McCabe*, 42 Miss. 255, and *Erwin v. Carson*, 54 Miss. 282, contending that this court had never declared that the decrees in those cases were nullities and liable to collateral attack, but had maintained the contrary doctrine in *Hanks v. Neal*, 44 Miss. 212. The latter principle was announced in *Blaine v. The Charles Carter*, 4 Cranch, 328, 333; *Wheaton v. Sexton*, 4 Wheat. 506; *Elliott v. Piersol*, 1 Peters, 340; *Taylor v. Thomson*, 5 Peters, 358; *United States v. Arredondo*, 6 Peters, 728, 730; *Voorhees v. Bank of United States*, 10 Peters, 449; *Cocke v. Halsey*, 16 Peters, 87; *Cooper v. Reynolds*, 10 Wall. 308, and *Ludlow v. Johnson*, 3 Ohio, 560. And in *Wyndham v. Wyndham*, 3 Ch. Rep. 22, the Lord Keeper sustained the title of purchasers for valuable consideration under an irregular decree; for "otherwise," he said, "you will, like gunpowder, blow up the whole Court of Chancery."

2. Did the Chancery Court have jurisdiction of the subject-matter of the partition suit? If this court acts upon the wise maxim of *stare decisis*, the question is fully answered in *Wilson v. Duncan*, 44 Miss. 642, and re-announced in *Pankey v. Howard*, 47 Miss. 83, and *Spight v. Waldron*, 51 Miss. 356. Aside from these cases the concurrent jurisdiction of courts of chancery in cases of partition seems to be universally admitted. 2 Story Eq. Jur. ch. 14. But we refer to special cases in which the question is set at rest forever. *Haywood v. Judson*, 4 Barb. 228, was a case similar to this. In *House v. Falconer*, 4 Desauss. 86, the bill was filed against infants and the lands were decreed to be sold; and in *Lawes v. Lumpkin*, 18 Md. 334, it was adjudged that a court of equity may entertain a bill filed by an adult heir, against the widow and minor



heirs, to obtain a sale and partition of the property of the deceased ancestor. The following cases also affirm the doctrine contended for: *Thayer v. Lane*, Harr. (Mich.) 247; *Howey v. Goings*, 13 Ill. 95; *Kennedy v. Kennedy*, 43 Penn. St. 413; *Hopper v. Fisher*, 2 Head, 253; *Castleman v. Veitch*, 3 Rand. 598; *Hartshorne v. Hartshorne*, 2 N. J. Eq. 349; *Wright v. Marsh*, 2 G. Greene, 94; *Donnell v. Mateer*, 7 Ired. Eq. 94; *Rabb v. Aiken*, 2 McCord Ch. 118; *Wiseley v. Findlay*, 3 Rand. 361; *Shull v. Kennon*, 12 Ind. 34; *Thornton v. Thornton*, 27 Mo. 302; *Patton v. Wagner*, 19 Ark. 233; *Smith v. Smith*, 10 Paige, 470.

3. The objection made by the defendants in error to the record, in the proceeding to enforce the vendor's lien, was that it in no wise affected their title as plaintiffs in this suit, claiming as the heirs of James Simmons; and the court erroneously held that they were not bound thereby. The complainant was only required to state his case in his bill, and make all persons interested in the land defendants. *Cockrell v. Gurley*, 26 Ala. 405; Story Eq. Pl. §§ 72, 76 *a*. If the minors had a title paramount or any other defence, they should have set it up by plea or answer. In a collateral proceeding, the only question is, whether, on the bill as framed, a decree on the merits and complete justice could be had between the parties. *Elmendorf v. Taylor*, 10 Wheat. 152; *Kirkham v. Justice*, 17 Ill. 107; *Sneed v. Ewing*, 5 J. J. Marsh. 460. The plaintiff in error, in tracing title, is not, however, compelled to go back to the suit to foreclose the vendor's lien. That proceeding culminated in a sale under decree and a purchase by the plaintiffs in this ejectment, who are bound by the subsequent partition proceeding based on their purchase, to which they were parties, and the plaintiff in error need not look beyond the decree in the latter case.

4. The court also erred in not allowing Philip G. Cocks to prove that the purchase-money had been paid, and in considering the testimony of the commissioner, Stigler, to disprove the execution and delivery of his deed. Although by agreement of counsel the deed was left in his hands as security both for the unpaid purchase-money and to await the result of the injunction suit, yet Stigler held the deed for Cocks, and the

sale became final the instant the report was made and confirmed. *Blossom v. Railroad Co.* 3 Wall. 207; 2 Dan. Ch. Prac. 1279. The deed had been delivered. *Byers v. McClanahan*, 6 Gill & J. 250; *Shirley v. Ayres*, 14 Ohio, 307; 2 Stark. Evid. 477; 4 Kent Com. 454; *Farrar v. Bridges*, 5 Humph. 411; *Brown v. Austen*, 35 Barb. 341. If a grantor executes a deed and leaves it with a third person, at the request of the grantee, it will be a sufficient delivery. *Hatch v. Bates*, 54 Maine, 136; *Turner v. Whidden*, 22 Maine, 121; *Morrison v. Kelly*, 22 Ill. 610; *Wheelwright v. Wheelwright*, 2 Mass. 447; *Kane v. Mackin*, 9 S. & M. 387; *Buffum v. Green*, 5 N. H. 71; *Church v. Gilman*, 15 Wend. 656; *Ruggles v. Lawson*, 13 Johns. 285; *Cincinnati Railroad Co. v. Iliff*, 13 Ohio St. 235; *Stephens v. Huss*, 54 Penn. St. 20; *Eckman v. Eckman*, 55 Penn. St. 269; *Halluck v. Bush*, 2 Root, 26; *Wall v. Wall*, 30 Miss. 91; *McLure v. Colclough*, 17 Ala. 96; *Rivard v. Walker*, 39 Ill. 413; *Mallett v. Page*, 8 Ind. 364; *Stevens v. Hatch*, 6 Minn. 64; *Warren v. Swett*, 31 N. H. 332; *Floyd v. Taylor*, 12 Ired. 47; *Dayton v. Newman*, 19 Penn. St. 194; *Harris v. Saunders*, 2 Strob. Eq. 370.

*W. L. Nugent*, on the same side, argued the case orally.

*H. S. Allen*, on the same side.

1. The sale of the land for division cannot be impeached in this proceeding. Process in chancery must be served as in the Circuit Court. Code 1857, p. 544, art. 27. And a return of "executed" renders the decree irregular only. *Merritt v. White*, 37 Miss. 438; *Robertson v. Johnson*, 40 Miss. 500. In the partition suit there was due service on the minors, but none on their mother. If there is imperfect service on an adult, and he answers, all defects are cured; and if there is an incomplete service on minors, and they answer by guardian *ad litem*, as in that case, deficiencies in the service of process are remedied, and the decree is valid.

2. The bill was not for partition, but for a sale to divide the proceeds. The Chancery Court has a general jurisdiction over the subject-matter. *Wilson v. Duncan*, 44 Miss. 642; *Higginbottom v. Short*, 25 Miss. 160. And when the court has original jurisdiction recitals in the decree are regarded as true, unless the contrary appears from other parts of the record. *Commer-*

*cial Bank v. Martin*, 9 S. & M. 613; *Pouns v. Gartman*, 29 Miss. 133; *Martin v. Williams*, 42 Miss. 210; *Harris v. Ransom*, 24 Miss. 504; *Frisby v. Harrison*, 30 Miss. 452; *Pollock v. Buie*, 43 Miss. 140; *Hardy v. Gholson*, 26 Miss. 70; *Cannon v. Cooper*, 39 Miss. 784; *Monk v. Horne*, 38 Miss. 100. Even if the decree was erroneous, the purchaser acquired a good title. *Wilson v. Duncan*, 44 Miss. 642.

C. V. Gwin, for the defendants in error, made an oral argument and filed a brief.

1. The first ground of objection to the deed from the commissioner to the defendant's father was that it had never been delivered to the father, nor to any one for him, during his lifetime. The sale had been enjoined in another suit in the same court, so that no valid delivery could be made, and by agreement between the counsel representing all the parties in both suits the deed was retained by the commissioner. The plaintiff in error claimed the legal title as defendant in the ejectment suit, in which that title alone could be considered. Delivery of the deed to a grantee capable of receiving it was as essential as the signature or seal. 3 Wash. Real Prop. 239; *Kearny v. Jeffries*, 48 Miss. 343; *Jelks v. Barrett*, 52 Miss. 315; *Morgan v. Hazlehurst Lodge*, 53 Miss. 665. The right of Philip G. Cocks' father under the contract of purchase, confirmed by the court, was only an equity. *Williamson v. Berry*, 8 How. (U. S.) 495; *Macy v. Raymond*, 9 Pick. 285; *Leshey v. Gardner*, 3 Watts & Serg. 314; *Rawlings v. Bailey*, 15 Ill. 178; *Blossom v. Railroad Co.*, 3 Wall. 207; *Childress v. Hurt*, 2 Swan, 487; *Robinson's Appeal*, 62 Penn. St. 213. Confirming the report of a chancery sale simply completes the contract, and does not pass the legal title. *Webster v. Hill*, 3 Sneed, 333.

2. Under our system a court of chancery cannot sell land for partition among joint tenants, some of whom are minors. The decision in *Wilson v. Duncan*, 44 Miss. 642, is wrong. Prior to 31 & 32 Henry VIII., none but parceners could compel partition. The jurisdiction of courts of law and equity was concurrent until 3 & 4 William IV. abolished the former. At common law, and under the English statutes, the court had no power to sell the land. Reviewing also the act of June

10, 1822 (Hutch. Code 611), which was a transcript of that of March 4, 1803, and a substantial re-enactment of 31 & 32 Henry VIII., and the act of Nov. 26, 1821 (Hutch. Code 670), the act of Dec. 16, 1830 (Hutch. Code 677), the act of Dec. 25, 1833 (Hutch. Code 679), and Code 1857, p. 316, art. 48, p. 454, art. 117, p. 464, art. 153, counsel contended that the general system of legislation on the subject-matter of the statute, which should be considered in determining its construction (*Fort v. Burch*, 6 Barb. 60; *United States v. Collier*, 3 Blatch. 325), showed the legislative intent to deny to courts of law and equity the power to partition land where minors were interested. This intent was in harmony with the constitution of 1832, the design of which, with the legislation thereunder, was to place the estates of minors held by descent or devise, in the exclusive control of the Probate Court. *Smith v. Craig*, 10 S. & M. 447. The Chancery Court had no jurisdiction to order the sale of an infant's real estate, unless conferred by statute. *Taylor v. Philips*, 2 Ves. 23; *Russel v. Russel*, 1 Molloy, 525; *Rogers v. Dill*, 6 Hill, 415. The power was not conferred by Code 1857, p. 316, art. 48, to the benefit of which only adult co-owners of land were entitled, or by Code 1857, p. 551, art. 73. Under the Constitution Chancery Courts might divide land where the parties could have partition at law, and the latter statute authorized a sale in cases in which partition could be decreed. This was merely giving a remedy by the speedier and more effectual machinery of the Chancery Court, to supply the deficiencies of the proceeding at law. Minors were excluded at law. They could not apply in chancery, because the statutes (Code 1857, p. 454, art. 117, p. 464, art. 153) giving them the new right specified the tribunal to enforce it. *Potter's Dwaris*, 295; *Millar v. Taylor*, 4 Burr. 2303; *Smith v. Lockwood*, 13 Barb. 209. Sale of infants' lands, which was "orphans' business," could be made only on application of their guardian, and by sanction of the Probate Court. The Chancery Court had no jurisdiction of the subject-matter.

3. Nor had the court, in that suit, jurisdiction over the persons of the plaintiffs in this, for want of service of process, and the decree as to them was void. The writ was served on these infants who were without father or guardian, but not on their

mother, who, as the record fails to disclose her death, is presumed to be living. Such service was fatally defective, and the decree thereon was not voidable, but void. Code 1857, p. 489, art. 64; *Ingersoll v. Ingersoll*, 42 Miss. 155; *Johnson v. McCabe*, 42 Miss. 255; *Price v. Crone*, 44 Miss. 571; *Erwin v. Carson*, 54 Miss. 282. In the vendor's lien suit this reasoning applies with greater force, for there the infants were not served at all, but the writ was executed on a person as their guardian, who was not such guardian.

4. The title which the plaintiffs in ejectment have as heirs of James Simmons was not affected by the decree in the suit to enforce the vendor's lien against them as the representatives of Crosby S. Skidmore. The bill in that case puts nothing in issue but the claim against Skidmore. The heirs of Simmons are legally distinct from Skidmore's heirs, although actually the same persons, and they are not bound in the capacity in which they were not sued. Freeman on Judgments, § 162; *Winslow v. Grindal*, 2 Greenl. 64; 2 Smith's Lead. Cas. 589; *Brooking v. Dearmond*, 27 Ga. 58; *Robinson's Case*, 5 Coke, 32 b; *Benz v. Hines*, 8 Kansas, 390; 4 Com. Dig. title Estoppel C; Bigelow on Estoppel, 65; *Dale v. Rosevelt*, 1 Paige, 35; *Werkheiser v. Werkheiser*, 3 Rawle, 326; *Wood v. Jackson*, 18 Wend. 107; *Nash v. Cutler*, 16 Pick. 491; Freeman on Judgments, § 156; *Screven v. Joyner*, 1 Hill Ch. 252; *Jones v. Blake*, 2 Hill Ch. 629; *Singleton v. Gayle*, 8 Porter, 270; *Stoops v. Woods*, 45 Cal. 439; *Rathbone v. Hooney*, 58 N. Y. 463; *Middleton's Case*, 5 Coke, 28 b; *Legge v. Edmonds*, 25 L. J. Ch. 125; *Fenwick v. Thornton*, Moody & M. 51; *Metters v. Brown*, 1 Hurl. & C. 686. A former judgment or decree is conclusive only as to facts directly in issue, and the finding of which were necessary to uphold it, and the estoppel does not extend to those which may have been in controversy, but which rested in evidence and were merely collateral. *Hunter v. Davis*, 19 Ga. 413; *St. Rome v. Carondelet Canal & Navigation Co.*, 24 La. An. 331; *Glass v. Wheeliss*, 24 La. An. 397; *Garwood v. Garwood*, 29 Cal. 521; *King v. Chase*, 15 N. H. 9; *Land v. Keirn*, 52 Miss. 341; Freeman on Judgments, §§ 257, 258. No judgment or decree is evidence in relation to any matter

which came collaterally in question. *Lawrence v. Hunt*, 10 Wend. 80; *Jackson v. Wood*, 3 Wend. 27; *Wood v. Jackson*, 8 Wend. 9, 35; *Hopkins v. Lee*, 6 Wheat. 109; *Lewis & Nelson's Appeal*, 67 Penn St. 153; 1 Greenl. Evid. § 528 *et seq.*; Freeman on Judgments, §§ 258, 259. The conveyance under the vendor's lien sale is not binding on these plaintiffs, who, as infants, were incompetent to make that contract. Only the interests in issue in the suit to divide the land were affected thereby, and under Code 1857, p. 320, art. 64; Code 1871, §§ 1265, 1838, the plaintiffs in this suit are not concluded by that decree, but may show that they were not tenants in common with the other parties. If, therefore, both decrees had been valid, the rights by virtue of which the plaintiffs sue in ejectment are not affected by them, and Philip G. Cocks, who claims through those decrees, must yield to the plaintiffs' superior title.

*Frank Johnston*, on the same side, argued orally and in writing.

The court did not, in the proceeding on which either decree is based, acquire jurisdiction over the minors, because of the defects in the service of process. *Price v. Crone*, 44 Miss. 571; *Erwin v. Carson*, 54 Miss. 282. In the case of an infant, no actual notice can be given, and a defect in service cannot be likened to an imperfect return as to an adult defendant, where notice *in fact* is brought home to him, though in an irregular mode. The rule as to constructive service, therefore, should apply in this case, *Hallett v. Righters*, 13 How. Pr. 43; and a serious defect should render the decree void, *Borden v. Fitch*, 15 Johns. 121; *Bigelow v. Stearns*, 19 Johns. 89. Constructive service must follow the statute, to give the court jurisdiction. *Boyland v. Boyland*, 18 Ill. 551; *Brownfield v. Dyer*, 7 Bush, 505; *Hollingsworth v. Barbour*, 4 Peters, 466; *Shields v. Miller*, 9 Kansas, 390; *Dean v. Nelson*, 10 Wall. 158; *Kitsmiller v. Kitchen*, 24 Iowa, 163; *Knott v. Jarboe*, 1 Met. (Ky.) 504; *Herdman v. Short*, 18 Ill. 59; *Whitney v. Porter*, 23 Ill. 445; *Fontaine v. Houston*, 58 Ind. 316; *Bradley v. Jamison*, 46 Iowa, 68; *Smith v. Wells*, 69 N. Y. 600. There is no force in the argument that the court had jurisdiction because it so declared in the orders ap-

pointing the guardians *ad litem*. A court cannot acquire jurisdiction over a person by deciding that it has jurisdiction. The writs and returns are as much parts of the record as the decrees, and the former show that the recitals in the latter are errors. The returns showing that the services were not legal, the decrees cannot make them so. *Harrison v. Agricultural Bank*, 2 S. & M. 307; *Pouns v. Gartman*, 29 Miss. 133; *Martin v. Williams*, 42 Miss. 210. The decrees are therefore void, *Dogan v. Brown*, 44 Miss. 235; and can be attacked collaterally.

GEORGE, C. J., delivered the opinion of the court.

This is an action of ejectment for the recovery of a valuable plantation in Holmes County, and resulted in a verdict and judgment for the plaintiffs in the court below, from which the defendant sued out this writ of error. Both parties claimed under Samuel B. Simmons. The plaintiffs deraigned title from said Samuel B. Simmons by introducing a deed from him to Crosby S. Skidmore, dated Nov. 14, 1859, by which the plantation in controversy, consisting of eleven hundred and sixty-six acres, was conveyed to said Crosby S. Skidmore, for the consideration of \$64,000, which sum appeared on the face of the deed to be payable in annual instalments, the last one falling due on Jan. 1, 1869. In this deed was also an express reservation of a lien on the land, to secure the payment of the purchase-money. The plaintiffs then introduced a deed from said Crosby S. Skidmore to James Simmons, dated also on Nov. 14, 1859, by which seven hundred and thirty acres of the tract, designated by land office numbers, were conveyed to said James Simmons, for the consideration of \$10,000, which was acknowledged in the deed to have been then paid. C. S. Simmons, one of the plaintiffs below, then testified that he and his co-plaintiff were the children and sole heirs of said James Simmons, the grantee in the last-mentioned deed, who died, in possession of the land sued for, in the year 1862; that James Simmons was also a child of Samuel B. Simmons, the grantor in the first-named deed; that the plaintiffs were also the children and sole heirs of Ann Augusta Skidmore, who was a child and one of the heirs of Crosby S. Skidmore, the

grantee in the said first-mentioned deed; and that their mother died in 1861. The plaintiffs claimed the seven hundred and thirty acres embraced in the deed of their maternal grandfather, said Crosby S. Skidmore, as heirs of their father, James Simmons, who, as before shown, had received a deed therefor from said Crosby S. Skidmore; and they claimed an undivided one-fourth interest in the remaining four hundred and thirty-six acres, as heirs of their mother, who was one of the four heirs of said Crosby S. Skidmore. The defendant in the court below deraigned his title as follows: He offered in evidence a record of certain proceedings in the Chancery Court of Holmes County, in which the executor of Samuel B. Simmons (the grantor in the deed to Crosby S. Skidmore) obtained a decree against the executor and heirs of said Skidmore, condemning the whole eleven hundred and sixty-six acres to be sold for the unpaid purchase-money due to said Samuel B. Simmons. This record shows that a sale was made in pursuance of the decree, and that the eight heirs of said Samuel B. Simmons were the purchasers, each heir to take an undivided interest in the land, according to his right in the estate of said Samuel B. Simmons; and the amount of each share was specified in the deed. The plaintiffs below were mentioned in the deed among the grantees, and as heirs of said Samuel B. Simmons (their grandfather) entitled, together, to one-eighth part of the land. The defendant below then further offered in evidence a record of certain other proceedings of the Chancery Court of Holmes County, in which three of the heirs of said Samuel B. Simmons procured a decree against the other heirs (including the plaintiffs in the court below) for a sale of the whole tract of eleven hundred and sixty-six acres, for partition. This decree was dated Aug. 29, 1870, and a sale was made under it in the following November, which was confirmed by the court in February, 1871. At this sale John G. Cocks, the father of the defendant below, became the purchaser, at the price of \$18,172. If these proceedings in the Chancery Court were valid, the defendant below had a good title to the land, and the judgment should have been in his favor. Various objections are made to these proceedings, and it is insisted that they were void. This view received the



sanction of the court below, which excluded said records and the deeds founded upon them from the jury. We will now proceed to notice, *seriatim*, the objections urged to the validity of the proceedings.

It is urged that the decree in the suit to enforce the vendor's lien is void, because it does not appear from the record that the plaintiffs below, who were minors, were made parties to that suit. The summons appears to have been issued against these plaintiffs, who are stated in it to be infants, having one Carraway as their guardian. Carraway is also stated in the bill to be their guardian. This summons was returned executed on him, and the return was silent as to the infants. It was also shown by the answer of the defendants in that suit, that the person named as guardian was not, in fact, guardian. The return, therefore, was no service on the infants. It was not a defective service, nor a defective return of service, but it was no service at all. If this were all that the record contained as to the jurisdiction of the court over these parties, the decree would be void as to them. The court, however, in the order appointing a guardian *ad litem* for these minors, makes this recital, "It appearing to the satisfaction of the court that subpoena or summons has been duly executed upon the minor defendants in this cause," and then proceeds to name the infants, among whom are the plaintiffs below; and thereupon J. S. Hoskins is appointed guardian *ad litem*, and ordered to defend for the infants. Here is a distinct and unequivocal adjudication, made by the court, as to a matter upon which it was bound to make an examination and decision, as a prerequisite to the order which it was then about to make. Unless the court was satisfied that process had been duly served on the defendants, it was bound not to make an order appointing the guardian *ad litem*, and it was bound also to arrest the proceedings in the cause until such process was served. Under such circumstances, the recital in the order must be held to be the solemn adjudication of the court that process had been duly served. Nor can it be rightfully said that the adjudication thus made is in opposition to the record, which discloses a summons only served on a person who was not guardian for these infants; for, notwithstanding this, the

court may have ordered, as was its plain duty, an *alias* summons, which may have been returned properly executed ; and in the lapse of time which has since occurred it may have been lost from the files. Especially would this be a reasonable presumption when we take into consideration the known carelessness with which court papers are kept during the progress of a cause, and the custom by which they are frequently taken from the clerk's office by the attorneys and other parties interested. But, however this may be, it is well settled that in collateral proceedings such a decision is conclusive of the jurisdiction of the court. Whether the court had the proper evidence before it on which to base such a decision cannot be inquired into collaterally, for that would be a question of error or no error, which manifestly can be entertained only in a court sitting to review the proceedings. *Harris v. Ransom*, 24 Miss. 504 ; *Cannon v. Cooper*, 39 Miss. 784. This rule is absolutely essential, in order that faith and credit may be accorded by the community to the decrees and judgments of courts of record ; and that parties acting in obedience to them, or acquiring rights under them, may have the confidence and repose flowing from a conviction that the solemn judgments and decisions of the higher courts, so long as they remain unreversed, will not be disregarded. It is attempted to weaken the force of this position by the suggestion that no man should be bound by a judgment of which he had no notice, and therefore no opportunity of resisting ; and that if he were denied the opportunity of showing that he had no notice, by a decision made in his absence, that would be confessedly binding him, as to that decision, without notice. But it may be replied, that all proceedings in courts of justice are based upon the confidence that the officers of the law, the clerks and sheriffs as well as the judges, will do their duty, and in all their official acts conform to truth and justice. It is this confidence that makes the return of the sheriff on the process, showing its due execution, unimpeachable after final judgment. This return is made in the absence of the party served ; and he may as well complain that he should not be bound by a return thus made by an officer in his absence, as of a judicial decision as to the same matter.

It is next urged against the proceedings in the suit to enforce the vendor's lien, that the bill was against the plaintiffs below, solely in their character as heirs of Crosby S. Skidmore, and that no notice was taken of the deed for seven hundred and thirty acres, made by said Skidmore to James Simmons, their father, and that their rights under that deed were not affected by the decree and sale in that suit. It has been shown that the plaintiffs were parties to that proceeding, and that they were represented by a guardian *ad litem*. If in fact they had rights as heirs of their father, which they could have asserted in opposition to the enforcement of the vendor's lien, it should have been asserted in that proceeding. They were as much bound to set up their rights, if they had any, under that deed, as they were to assert payment, or any other affirmative defence. They were before the court, were bound by its decree, which gave them no right under said deed, and they are concluded by it in all collateral proceedings. That they were infants and incapable of making their defence makes no difference in this respect. Beyond the rights, reserved to them by law, of proceeding to have decrees reviewed within one year after they attain their majority, and their exemption from the operation of the Statute of Limitations, barring writs of error and appeals, they have no further claims to impeach decrees rendered against them than are accorded to adults. If their guardians have not made proper defences it is their misfortune. Society undertakes, in view of the incapacity of minors to manage their own affairs, to furnish them suitable guardians to protect their interests; but it does not undertake to guarantee in them perfection and infallibility.

It is next urged that the decree in the partition suit is void, because the summons was served on the plaintiffs, who were then infants, by service on them alone, the record showing that they had no guardian or father, but not showing that they had no mother. In this record is the recital, in the order appointing the guardian *ad litem*, that it appeared to the court that process had been returned duly served on the infants. If in fact there was no mother then living, and it so appeared in any part of the record, the service on the infants would be in all respects

exactly regular and proper. It is not necessary that the sheriff's return should say any thing about the non-existence of a guardian or parents. From the impossibility of the sheriff determining, as a matter of fact, the non-existence of these persons outside of the limits of his own country, it would seem to be the better rule to hold that their non-existence should be shown in some other way; and it would seem to be wholly immaterial whether this was shown before or after the return of service on the infants. The statute requires service on the father, mother, or guardian, if there be such, and whenever their non-existence is shown anywhere in the record, as a fact, the service is regular if made on the infants alone. The adjudication in this record, that the return of service was legal, must have been made on the proof then presented to the court, that there was no guardian, father, or mother; and it will not be denied, that if the order had recited that such proof was made, the service would have been regular in all respects, and unimpeachable even in a direct proceeding. In a direct proceeding, however, as has frequently been held by this court, this recital is insufficient to show affirmatively the non-existence of the father, mother, or guardian. *Crauford v. Redus*, 54 Miss. 700; *Billups v. Brander*, 56 Miss. 495. But when considered in a collateral proceeding there is no doubt, for the reasons given in relation to the service of process in the proceeding to enforce the vendor's lien, that the adjudication of the court on this subject is conclusive. It is a significant fact, as showing the extremely technical nature of this objection, that one of the plaintiffs in the court below, when introduced as a witness in his own behalf and to establish his heirship, stated that both his father and mother died long before the commencement of either of the suits, and the record itself shows that they had no guardian.

It is next insisted that the decree of the Chancery Court in the partition proceedings is void for want of jurisdiction over the subject-matter. It is argued with great zeal and ability, that, as there were minors interested in the land, the only jurisdiction to order a sale was in the Court of Probate, and we are asked to review and overrule the decision of this court in *Wilson v. Duncan*, 44 Miss. 642, in which the jurisdiction

of the Chancery Court in a like case was upheld. We have considered all that has been urged against that decision, and we are satisfied it is correct, and will therefore follow it.

It is also urged against both decrees that the plaintiffs were infants, and incapable of becoming purchasers at the sale made under the decree enforcing the vendor's lien; and that they lost by that sale none of their rights as heirs of Crosby S. Skidmore and of their father, and acquired none, and that as the partition proceedings were based on the validity of the title under that purchase, and made no mention of their rights as heirs as above mentioned, no title was conveyed to the purchaser under the decree for partition. This objection is without force. A purchase by an infant is not void, but only voidable. It is good till disaffirmed by him. If they had disaffirmed the act of the executor of Samuel B. Simmons and the adult co-heirs, in embracing them as co-grantees in the deed to the extent of their interest in the purchase-money, it would not have made the sale void, but would only have given them a right to one-eighth of the money, instead of to that proportion of the land. The partition proceeding being based on the fact that they were grantees in that deed, and had the interest in the land which that deed gave, and no more, and they having been, as shown, parties to that proceeding, they cannot now defeat the title of the purchaser by alleging that they had no such title.

It is finally urged, in opposition to the title of the defendant, that the deed of the commissioner, being to John G. Cocks and his heirs, was not delivered till after the death of John G. Cocks; and hence, there being no valid delivery, there was in fact no deed. The facts as they appear in the record, so far as they relate to this last objection, are as follows:—

In August, 1870, a decree was rendered in the partition suit, ordering a sale of the land for cash, and appointing J. M. Stigler a commissioner to make the sale; and he was "directed to execute a deed to the purchaser of said land, and report his proceedings under this decree to a subsequent term of the court." On Nov. 21, 1870, Stigler made a sale as directed, and John G. Cocks became the purchaser at the price of \$18,177. On the same day a formal deed to Cocks

was drawn up, and then signed and sealed by Stigler, who also on that day acknowledged, before a competent officer, that he had signed, sealed, and delivered the deed. At the next term of the court, in February, 1871, he made a report to the court, in which he stated that he had made the sale in pursuance of the decree, and that John G. Cocks was the purchaser, and that he (the commissioner), "as in said decree directed, executed to said John G. Cocks a deed for the land so purchased by him." At the same term of the court an order was made, which stated that it was "ordered, adjudged, and decreed by the court, that said sale, and *said report thereof* be, and the same are hereby, in all things confirmed."

The defendant below produced the deed, and offered it in evidence to support his title. The plaintiffs, to disprove its delivery, read in evidence to the judge the deposition of said Stigler, in which he stated that he was enjoined from making the sale and paying over the money to be derived from it, by one Holmes, an alleged creditor of said Samuel B. Simmons; that no money was, in fact, paid on the day of sale, but afterwards, in 1872, John G. Cocks paid, on the order of the commissioner, to the heirs of said Samuel B. Simmons, \$8,172, including \$1,362 to the then guardian of the plaintiffs; that he never delivered the deed to John G. Cocks, but kept it for him, and as security for the \$10,000 remaining unpaid; that John G. Cocks died in 1873, and the defendant finally, in 1877, paying the whole of the purchase-money, he delivered the deed to him; that the injunction suit also prevented the payment of the \$10,000 by Cocks; that there was an agreement between the counsel in the chancery suit in which the sale was ordered, and the counsel in the injunction suit, that he, the commissioner, should make the deed to Cocks, and hold it till the \$10,000 was paid. Stigler also stated that he was enjoined from paying over the whole amount of Cocks' bid, and that he would not have delivered the deed to Cocks without payment of the \$10,000, and that while he had the deed it was under his control.

When this deposition was read in connection with the records in the two chancery proceedings above discussed, the court refused to allow the case to go to the jury, adjudging, as

we understand the record, that the deed had never been validly delivered. In this the court erred, not only in assuming to determine the question raised as to the delivery, instead of leaving it to the jury, but also in deciding erroneously that there had been no delivery. Under the circumstances, it was not competent for the plaintiffs to deny that the deed was duly delivered to John G. Cocks, and we also think that, apart from any question of estoppel, the evidence would have fully warranted the jury in finding that the deed was duly delivered.

It will be remembered that Stigler, the commissioner, was not the real vendor of the land. In such sales the court is the real vendor, and employs a commissioner merely as its instrument in consummating the transaction. The commissioner is less than an agent, for his acts are not binding, until they have received the sanction of the court, after they have been performed. When he acts, he executes the will of the court, not his own. He is the body, and the court the animating spirit which puts him in motion and directs and gives validity to his acts. He has no rights in the estate; and parts with none by his deed. He is appointed by the court to execute its will and effectuate its purposes, and may be discarded at any stage in the progress of the transaction, and another employed in his stead. In this case, he was directed by the decree of the court to make a deed to the purchaser, — not merely to sign and seal a deed, but to make a perfect and operative deed. He did sign and seal a deed, and acknowledged solemnly before a proper officer, in accordance with law and the decree of the court, that he had also delivered it. He then reported to the court, in discharge of a high duty to make a truthful statement of how he had executed the decree, that he had fully executed the deed according to its directions; and the court confirmed his acts, as thus reported, and adjudged the deed to have been fully executed, and its own and the commissioner's duties fully discharged. The court, which was the real vendor, and whose will alone was of any operative force in the transaction, thus assented in the most solemn form to the full execution of the deed, including its delivery, and adjudged that the essential act for the consummation of the sale had been per-

formed. When this was done, the commission given by the court to Stigler was at an end. He had no power to do any further act; and as to what had been adjudged by the court to have been rightly and solemnly done, he had no power or control. His powers, whatever they may have been, were derived from the court for the purpose of executing its will, and he could not undo what had been done; nor, after the court had adjudged that his work was fully completed to its satisfaction, had he any revisory power to correct or perfect it. Henceforth he was *functus officio*, and stood in the relation of a stranger to the deed, with no power to retain it except as a mere depositary and as a private person. It was to all intents and purposes delivered. Actual manual tradition of the deed is not necessary to a delivery, even when the grantor is real and not nominal. A delivery is effected when by words or actions an intention is indicated that the deed shall be considered as fully executed. 4 Kent Com. 455, 456, note. Here the only party who had any will in the premises, or who had a right to give or withhold a deed, had not only manifested in the most solemn form the intention that the deed should be considered as fully executed, but had given his assent to the fact that delivery had actually been made; and the other party, who had been charged with the duty of delivering it, had also acknowledged in the most solemn form that he had actually delivered it, and had so reported to the court. The test as to whether a deed has been sufficiently delivered, is the right of the grantee to have that specific deed put into his actual possession by whomsoever may hold it, and not merely to have a deed made in pursuance of a pre-existing equity. Whenever he has this right to a specific deed already drawn up, the deed has been effectually delivered and the title passed. In this case, if Stigler had refused to Cocks the possession of the deed, the court would have ordered its surrender. And if Stigler had died with it in his possession, a like order would have been made on his executor, or other person holding it.

But whether the proof showed a delivery or not, the plaintiffs were estopped to deny that there had been a valid delivery. The record of the court, as we have seen, showed that the deed had been delivered. This record was made at the in-



stance and on the report of the commissioner, in the discharge of a duty which had been imposed upon him by the court. It was the duty of the court to cause a deed to be made to the purchaser. This record, thus made, is an estoppel on the parties in that suit to deny that it is untrue, and that the purchaser failed to get the estate for an alleged non-delivery of the deed by the commissioner, where there is no suggestion of fraud, or that the substantial rights and interests of any party would be violated by holding the deed delivered. In this case the purchaser is in no default, and is entitled to the estate. Where all has been done in good faith that the purchaser was required to do; where it is certain that he is equitably entitled to the estate, and the objection is merely that he has failed to get the naked legal title, on account of an alleged non-delivery of the deed, we are bound to hold that the recitals and decrees in the record above set out import absolute verity, and estop the parties from denying the delivery.

The injunction proceedings referred to in the deposition of Stigler are without force to overturn the above conclusion. If the injunction were violated by a sale, no one can complain but the complainant in that suit. He makes no complaint here. Moreover, the decree for the sale, and the order confirming it, seem to have been made by the same court in which the injunction was pending, and these orders may be treated as a dissolution of the injunction, at least to the extent of allowing a valid sale to be made. Nor can the agreement of counsel, testified to by the witness, have any effect against the conclusion we have reached. This agreement seems to have been made with the view of facilitating the injunction proceedings by requiring the purchaser to keep in his hands enough money to meet the claims of the complainant in that suit. It looked, therefore, to validating the sale and securing the rights of the purchaser under it, and not to destroying them. That it was agreed that the commissioner should retain the deed till the purchase-money left in the hands of the purchaser should be paid over, seems to consist more with the idea that the retention was a deposit as a security for the purchase-money, than that it was a denial of any validity to the deed whatever, during the time of its retention. But, however this

may be, the agreement was a mere private arrangement made by counsel, without the sanction of the court, and looked solely to the rights of the complainant in the injunction suit, and did not contemplate the undoing of what had solemnly been decreed by the court.

The court below, in opposition to the views herein expressed, excluded from the jury both of the chancery records before referred to, and also the deed of the commissioner to Cocks. For these errors we reverse the judgment, grant a new trial to be proceeded with according to the principles of this opinion, and remand the cause. The assignments of error, based on the rulings of the court in the matter of rent and improvements, do not seem to require notice, under the view we have taken.

*Judgment reversed.*

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### ANNA W. DOWD, EXTRX., ETC. v. W. W. TROUP.

#### PARTNERSHIP. *Dissolution by death. Lawyers' fees.*

Unless the surviving partner of a firm of lawyers makes a new contract, he cannot claim additional compensation from a client for conducting to a conclusion the defence of a chancery suit, which the firm began before the death of the other partner, and for which it was paid the entire fee agreed upon.

ERROR to the Circuit Court of Monroe County.

Hon. J. A. GREEN, Judge.

The law firm of Sale & Dowd contracted with the defendant in error, in consideration of two thousand dollars paid, to defend a suit against him until its termination in the Chancery Court. Pending the suit, Sale died, but Dowd conducted it to a successful conclusion. The latter's executrix sued for additional compensation, alleging a new contract, which the defendant denied. The evidence was that Dowd, after Sale's death, informed Troup that he might employ other counsel, and Troup replied by expressing his confidence in Dowd's ability to successfully conduct the defence.

*Barter McFarland*, for the plaintiff in error.

The surviving partner of a mercantile firm is bound to conclude its unfinished undertakings, but with law firms the case is different. Contracts for the exercise of professional skill are personal, and are dissolved, like the firm itself, by either partner's death. *McGill v. McGill*, 2 Met. (Ky.) 258. Skill is not susceptible of delivery, but dies with the lawyer, thus, *ex necessitate*, putting an end to the contract. The survivor is entitled to compensation for the services rendered up to the dissolution. *Smith v. Hill*, 13 Ark. 173. But he is not bound to continue in a case without a new contract. No lawyer's estate can be held for his surviving partner's want of skill in managing cases pending in the firm's hands at his death. 2 Williams on Executors, 1467; Story Part. §§ 319, 319 a, 343. Such contracts are dissolved by death, like those of authors to write books. 1 Parsons on Contracts, 111. Under the circumstances of this case, Troup, therefore, became liable to Dowd for the services rendered after Sale's death.

*Murphy, Sykes & Bristow*, for the defendant in error.

No dissolution of partnership can affect third persons' rights arising from dealings with the firm. Parsons Part. 394; Story Part. § 334. Legal firms are no exception. *Warner v. Griswold*, 8 Wend. 665. But a partner is bound by his copartner's contracts within the scope of the firm business. *Livingston v. Cox*, 6 Penn. St. 360; *Lansing v. M'Killup*, 7 Cowen, 416; *McFarland v. Crary*, 8 Cowen, 253. The only distinction as to lawyers is, that the client employing a professional firm has a right to the services of all its members, and cannot, against his consent, be required to rely upon the skill of only one. *Cholmondeley v. Clinton*, 19 Ves. 261; *Cook v. Rhodes*, 19 Ves. 273, note; *McGill v. McGill*, 2 Met. (Ky.) 258. But if the survivor, with the client's consent, continues in the case on the original retainer, the dissolution by death, after the fee has been paid, can make no difference. The client, on the death of a partner, may dissolve the contract. *Smith v. Hill*, 13 Ark. 173. The surviving lawyer has no such right, but is bound to carry out his contract, especially where he has been paid. Troup, by electing to keep Dowd in the case, showed that the intent of the contract was not to secure Sale's

services. *Shultz v. Johnson*, 5 B. Mon. 497. If it be true that Sale's death terminated the contract, Troup should recover from Dowd all the fee advanced, except the part earned by the services of the firm. Troup did not become liable to Dowd on a *quantum meruit*, because of the special contract. *Bull v. St. Johns*, 39 Ga. 78. Nothing was ever said between them as to a new retainer.

CAMPBELL, J., delivered the opinion of the court.

As Troup was willing that Dowd, the survivor of the law firm of Sale & Dowd, whom he had employed and paid to conduct his defence through the litigation in the Chancery Court, should fulfil the obligation of Sale & Dowd, it was not allowable for Dowd, who was but discharging his own obligation as a member of the partnership of Sale & Dowd, to claim of Troup any more, for services he rendered after the dissolution of the partnership by the death of Sale, than Sale & Dowd could have claimed if they had rendered all the services. The death of Sale entitled Troup to settle with Sale & Dowd for services rendered, and to employ other counsel; but if Troup was willing that Dowd should stand in the place of Sale & Dowd, and go on with the case as if Sale had not died, Dowd had no claim on Troup for additional compensation, unless there was a new contract between them, by the terms of which he was to have such compensation. *Weeks on Attorneys*, § 191. There is no satisfactory evidence of a new contract between Dowd and Troup, by which Dowd was entitled to demand any thing of him.

*Judgment affirmed.*

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KATHERINE WOODS v. D. R. DAVIDSON.

APPEAL. *Bond. Suit in forma pauperis.*

A litigant, who has commenced suit *in forma pauperis* in a Justice's Court, cannot appeal without bond from an adverse decision. Const., art. 6. § 23; Code 1871, §§ 571, 1332.

ERROR to the Circuit Court of Chickasaw County.

Hon. J. A. GREEN, Judge.

The plaintiff in error, who sued *in forma pauperis* before a justice of the peace, made the usual affidavit for appeal from an adverse decision; but, as she gave no appeal bond, a motion by the defendant in error, in the Circuit Court, to dismiss the appeal, was sustained.

*L. Kimball*, for the plaintiff in error.

All persons who are injured, have, by Const., art. I. § 30, a right to sue for redress, which the legislature cannot abridge. The fact that the suit is *in forma pauperis* supersedes the requirement of an appeal bond.

*Martin & Bates*, for the defendant in error.

Although the plaintiff in error, under Code 1871, § 571, sues *in forma pauperis*, she is required, under Code 1871, § 1332, to give bond for appeal to the Circuit Court.

CHALMERS, J., delivered the opinion of the court.

The controlling question presented by the record is, whether a litigant, who has commenced a suit *in forma pauperis* in the Justice's Court, is entitled to appeal, without bond, from an adverse decision. The Constitution of the State (art. VI. § 23) provides that, "in all causes tried by a justice of the peace, the right of appeal shall be secured, under such rules and regulations as shall be prescribed by law." Sect. 1332 of the Code of 1871, in obedience to this provision of the Constitution, prescribes the rules and regulations for such appeals, and declares that "the party praying such appeal shall give bond, with security to be approved by said justice, payable to the opposite party, in the penalty of two hundred dollars."

We think that this mandatory requirement is not affected by § 571 of the Code, which, in effect, provides that any resident of the State may institute his suit without the prepayment of costs, and without giving security therefor, upon affidavit that "he believes there is just cause for the action, and that he is not able to pay the cost or give security for the same." Construing the two sections together, it must be held that the latter applies only to the court in which the suit is commenced, and authorizes its prosecution to

final judgment there; but that when the party against whom the case is decided desires a revision in a higher tribunal, he must conform to the general statutes regulating appeals.

*Judgment affirmed.*

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T. N. MARTIN ET AL. v. J. T. HARRINGTON ET AL.

ATTORNEY AND CLIENT. *Lien for fee. Land recovered.*

An attorney, who has recovered land for his client, in an action of ejectment, has no lien thereon, to secure his fee.

APPEAL from the Chancery Court of Chickasaw County.

Hon. L. HAUGHTON, Chancellor.

The appellants, who were retained to bring an action of ejectment, for a fee payable on success, filed this bill in chancery to enforce a lien on the land which had been recovered. The only error assigned is the final decree sustaining the appellees' demurrer and dismissing the bill.

*Martin & Bates*, the appellants, *pro se*.

The principle applicable to this case is well defined in *Stewart v. Flowers*, 44 Miss. 513. Although that case failed to come within the rule, this one meets all the requirements. The lien attaches to the judgment and its fruits, which are the land.

*Reuben Davis*, for the appellees.

An attorney's lien depends upon possession. Secret mortgages of land are opposed to the spirit of our registration laws, and are in violation of the Statute of Frauds. Nothing in *Stewart v. Flowers*, 44 Miss. 513, or the authorities cited in that case, sanctions the doctrine for which the appellants contend.

GEORGE, C. J., delivered the opinion of the court.

The question presented by this record for our decision is whether an attorney who has recovered land for his client in an action of ejectment, is entitled to a lien thereon for the payment of his fee. The complainants in the bill filed to enforce

this alleged lien, who are appellants here, rely solely upon the case of *Stewart v. Flowers*, 44 Miss. 513, as the authority for the relief which they ask. In that case, the opinion of the court, drawn up by Mr. Justice Tarbell, is marked by great research into the authorities on the subject of the liens of attorneys for their costs and fees. Many authorities are cited and commented on, and many extracts given from opinions delivered by other judges, as to which the court express neither assent nor dissent. The conclusion reached, however, was adverse to the claim for a lien set up by the attorney, and is no adjudication in favor of the right here claimed.

The appellants' counsel cite no authority in which a lien on real estate, recovered through the efforts of an attorney, is recognized. Our own researches have led us to only two. The first is *Barnesley v. Powell*, Ambler, 102. In that case, although Lord Hardwicke stated in general terms that an attorney recovering an estate for his client was entitled to a lien on it for his costs, yet he allowed the lien expressly on the ground that the client was a lunatic, that his committee had a lien on the estate for expenses incurred in the litigation, and that the attorney was entitled to be subrogated to this lien of the committee. The other case is *In re Seaman*, 3 Hurl. & C. 148, in which the lien was enforced in virtue of an English statute expressly authorizing it. Neither of these cases is, therefore, authority for the lien here claimed.

This lien has been disallowed expressly in at least three American cases. In *Hanger v. Fowler*, 20 Ark. 667, the Supreme Court of Arkansas, in an elaborate and learned opinion, in which many English and American cases on the subject of liens of attorneys were reviewed, held that the lien as here asserted was not allowable. The court reviewed the case of *Barnesley v. Powell*, *ubi supra*, and for the reasons above stated concluded that it is not an authority for the lien here claimed. The court declared its inability to find a single case to support the lien as claimed; which, if allowed, it said, would be an "extension of the doctrine of the solicitor's lien beyond any adjudged case, and would in effect create an equitable mortgage, which would be exposed to all the objections that have been or can be made to the doctrine of equitable

mortgages in England, and even more, under our registry system, without having the same plausible ground to stand upon, which is the presumed agreement to execute a legal mortgage." *Smalley v. Clark*, 22 Vt. 598, contains an able and elaborate opinion of the Supreme Court of Vermont, in which the same conclusion is reached. In the still later case of *Humphrey v. Browning*, 46 Ill. 476, the Supreme Court of Illinois cited and reviewed many cases on this subject, and said: "A careful review of the authorities cited satisfies us that no such lien" "has ever been allowed in any court in England, or in any of the States of this Union." The court further say: "It may be a lawyer's services in recovering a tract of land by suit are as meritorious as those of a carpenter or mason who builds a house; but the latter had no lien until it was given to them by an express statute. At common law, liens of particular persons, in certain cases, were recognized and enforced, but they were of a kind that attached to an article in the actual possession of the bailee. If he parted with the possession, the lien, in general, was lost." "Such a lien would be a secret lien, which the policy of the law does not encourage, and when claimed, must be supported by unquestioned authority." Montagu, in his Summary of the Law of Lien, p. 59 *et seq.*, in naming the subjects on which an attorney's lien attaches, omits all mention of land.

But the doctrine of equitable mortgages by a deposit of title-deeds has never been recognized in this State. In *Gothard v. Flynn*, 25 Miss. 58, the High Court of Errors and Appeals hold such a mortgage to be in conflict with the Statute of Frauds; and it is settled doctrine here, that no exceptions will be engrafted on that statute. Under this state of the law, we are not authorized to extend the lien of attorneys to land recovered by their efforts, however meritorious those efforts may have been. Attorneys who rely upon the estate to be recovered as a security for their fees must therefore take a lien by contract in writing.

The decree of the Chancellor was in accordance with these views, and is therefore

*Affirmed.*



## J. H. BURROW ET AL. v. L. D. SANDERS.

1. **CERTIORARI.** *Agricultural lien law.*  
*Certiorari* lies, by virtue of Code 1871, § 1336, to remove to the Circuit Court a case under the agricultural lien law (Acts 1876, p. 109) decided by a justice of the peace.
2. **SAME.** *Practice in Circuit Court. Judgments.*  
The Circuit Court should, in such case, examine the questions of law appearing on the face of the record and proceedings, and affirm or reverse the justice's judgment.
3. **SAME.** *Immaterial error. Supreme Court.*  
Although the *certiorari* is erroneously dismissed, the judgment of the Circuit Court will not be disturbed, if the same result would be reached by examining the questions of law presented by the record and proceedings.
4. **AGRICULTURAL LIEN LAW.** *Judgment. In rem. In personam.*  
In a proceeding under the agricultural lien law, a justice can give no judgment against a defendant for the sum due the plaintiff other than one to be satisfied out of the property seized. *Hartsell v. Myers, ante*, 135, cited.
5. **SAME.** *Costs. Personal judgment therefor.*  
He may, however, render a personal judgment against a defendant for any balance of costs not paid by the property seized, after paying the plaintiff what is due him.
6. **SAME.** *General judgment. How limited.*  
The judgment in such a case, although expressed in general terms, should be construed with reference to the nature of the proceeding as regulated by law and exhibited by the record.

ERROR to the Circuit Court of Lee County.

Hon. J. A. GREEN, Judge.

The defendant in error, as landlord, obtained a writ of seizure before a justice of the peace against his tenant, for fifty dollars rent due, and made J. H. Burrow and others defendants on the ground of their interest in the produce seized. The defendants presented their claims before the justice, who rendered thereupon the judgment that, "the plaintiff have and recover of the defendants the sum of fifty dollars and the costs by him in this behalf expended, and that all the produce levied on by said writ of seizure is condemned hereby to be sold to pay said sum, and if there is any overplus of money

left after paying said sum, then said overplus shall be applied to the payment of the costs as far as it will go, and should there be no overplus, the whole of the costs shall be levied upon the goods and chattels, lands and tenements of the defendants." When the plaintiffs in error had, by *certiorari*, brought the case to the Circuit Court, the defendant in error moved to dismiss, on the grounds that the writ was inapplicable to a seizure under the agricultural lien law, and that no error appeared in the record or proceedings before the justice, and accordingly the court dismissed the writ.

*W. J. Cole and Blair & Clifton*, for the plaintiffs in error.

1. The writ of *certiorari* applies to cases arising under the agricultural lien law in justices' courts. Acts 1876, p. 114, § 13. Code 1871, § 1336, providing for the writ, applies to all cases arising in justices' courts, and, as a statute regulating a remedy, should be liberally construed. No statute prohibits that method of reviewing cases of this character. The writ is of common-law origin, and may be granted by the circuit judge whenever it is promotive of justice. Code 1871, § 533; *Holberg v. Macon*, 55 Miss. 112; 1 Tidd's Prac. 398.

2. No personal judgment can be rendered in case of seizure of agricultural products under this statute. Acts 1876, p. 111, § 6. A judgment for costs *in personam* is as erroneous as one for the entire debt. The only order which the justice can make is that the property seized, being subject to the debt, shall be sold to satisfy the same and the costs. The judgment in the record, however, is a general one for both debt and costs. Even if there was no error in the record, the dismissal was improper. Under Code 1871, § 1336, an affirmance or reversal is the only judgment which the Circuit Court can render.

*J. D. Barton*, for the defendant in error.

1. The writ of *certiorari*, at common law, can issue only when there is no other remedy. *Delahuff v. Reed*, Walker, 74. It will not lie if an appeal can be had. *Holberg v. Macon*, 55 Miss. 112. Appeal, the only remedy provided by the agricultural lien law (Acts 1876, p. 114, § 18), is in this, as in prior similar statutes, so guarded as to speedily terminate the litigation. Acts 1872, p. 133. The spirit of the legislation

concerning agricultural liens is adverse to the allowance of the *certiorari*, which, if granted, would tend to protract the proceeding.

2. No error is apparent in the record of the proceeding before the magistrate, and the presumption therefore is, that the judgment is correct. *Lee v. Bennett*, 81 Miss. 119; *Cason v. Cason*, 31 Miss. 578; *Duncan v. McNeill*, 81 Miss. 704. No part of the judgment for the debt can, by its terms, be enforced except out of the products seized; but, after those products are exhausted, the balance of costs can be collected from the defendants. Regarding form, it is not a judgment *in rem*. *Brown v. Levee Commissioners*, 50 Miss. 468; *Lee v. Newman*, 55 Miss. 365. The costs were properly adjudged. *McCartey v. Kittrell*, 55 Miss. 258. An affirmance would have carried damages and concluded the case; Code 1871, §§ 1334, 1336; while dismissal was in comparison a benefit to the plaintiff in error of which he cannot be heard to complain.

*Nugent & McWillie*, on the same side.

CAMPBELL, J., delivered the opinion of the court.

Sect. 1336 of the Code of 1871, provides that "all cases decided by a justice of the peace may, within six months thereafter, on good cause shown by petition, supported by affidavit, be removed to the Circuit Court of the county by a writ of *certiorari*." There is nothing in the act entitled, "An Act to provide for Agricultural Liens, and for other purposes," approved April 14, 1876, inconsistent with this provision of the Code; and therefore it was admissible to remove the case decided by a justice of the peace to the Circuit Court by writ of *certiorari*.

The case having been thus removed to the Circuit Court of the county, the court should have examined the questions of law, "on the face of the record and proceedings," and should have affirmed or reversed the judgment of the justice. Instead of this the court dismissed the *certiorari*. This was not proper, but, if the same result was attained as would have been if the questions of law presented upon the "face of the record and proceedings" had been examined, the judg-

ment of the Circuit Court should not be disturbed, whatever may have been the view which produced it.

The fair construction of the judgment of the justice of the peace, from a view of the whole record of the proceedings before him, is that the money due the plaintiff in the suit was to be made out of the cotton seized, and that any excess of the proceeds of the cotton over the sum necessary to pay the plaintiff should be applied to the payment of costs, and that for any balance of the costs, not thus paid, execution should go against the defendants. The justice had no right to give any judgment against the defendants for the sum due the plaintiff, other than a judgment to be satisfied out of the cotton seized in the proceeding. *Hartsell v. Myers, ante*, 135. He had a right to adjudge the costs against the defendants, and did so, directing the application to their payment of any sum arising from the sale of the cotton after satisfying the demand of the plaintiff. The judgment of the justice would not sustain an execution for any thing except the costs.

Although the judgment is expressed in general terms, these terms are limited by a consideration of the nature of the proceeding, as regulated by law, and exhibited by the whole record. The statute confines the judgment to the property seized, and the claim of the plaintiff in the suit, as set forth in his affidavit, was made against the tenant as his debtor, and not against the plaintiffs in error, who were named as having some interest in or claim upon the cotton against which the plaintiff asserted a paramount right, and who were summoned to contest with the plaintiff as to the right to the cotton, and not as to liability for his demand, which was not asserted against them as debtors. They were not liable for the debt, and were not sought to be charged with it. They were liable for costs, and the legal effect of the judgment is to fix their liability for so much of the costs as should not be made by a sale of the cotton, after paying the plaintiff what was due him.

*Judgment affirmed.*

## JOHN C. McNAIRY, USE, ETC. v. GEORGE W. GATHINGS.

1. VERDICT. *Surplusage. Damages. Writ of inquiry. New trial.*

The assessment of damages, in a verdict for the plaintiff, although clearly erroneous on its face and based upon improper considerations, cannot, if essential to make the finding responsive to all the issues submitted to the jury, be stricken out as surplusage and a writ of inquiry awarded; but the entire verdict should be set aside, and a new trial granted.

2. SUPREME COURT. *New points.*

This court cannot examine the correctness of a verdict, unless exceptions were taken, or a motion for a new trial made in the lower court.

ERROR to the Circuit Court of Monroe County.

Hon. J. A. GREEN, Judge.

*Murphy, Sykes & Bristow, and J. B. Dowd*, for the plaintiff in error.

The issues were the plaintiff's right to recover, and the value of the cotton. *McNairy v. Gathings*, 52 Miss. 592. The verdict, "We, the jury, find for the plaintiff," responds to the first, but not to the second. No question was raised as to the value of Confederate or Mississippi money, but the latter words of the verdict are as much surplusage as would have been "valued of court house and grounds, \$20,000." The jury having found for the plaintiff, but having failed to assess the damages, a writ of inquiry should have been awarded. *Walker v. Commissioners*, 1 S. & M. 372; *Drane v. Hilzheim*, 13 S. & M. 336; *Merrill v. Melchior*, 30 Miss. 516; *Atkinson v. Foxworth*, 53 Miss. 733; *Spratley v. Kitchens*, 55 Miss. 578; 2 Tidd's Prac. 922 and note.

*Gholson & Houston, and G. J. Buchanan*, for the defendant in error.

The verdict responds to the issues made in the pleadings, and no evidence is in the record to show that these issues were narrowed by proof. The jury find for the plaintiff and assess his damages, and their verdict cannot be divided so as to retain the part favorable to the plaintiff and reject the rest. The presumption is that the verdict was warranted by the

facts. *Phillips v. Lane*, 4 How. 122; *Kingsley v. State Bank*, 3 Yerger, 107; 2 Tidd's Prac. 868. If the verdict was based on improper considerations, the remedy was a new trial, which was granted.

CHALMERS, J., delivered the opinion of the court.

This case was previously before us, and is reported in 52 Miss. 592. It is a suit upon a written instrument, whereby the maker acknowledges the receipt of three thousand dollars in Confederate treasury-notes and Mississippi cotton money, in payment of five thousand pounds of lint cotton, which cotton he obligates himself thereafter to deliver. The parties went to trial upon a plea of the general issue, and upon a special plea that the contract had been abandoned by the plaintiff before suit brought. When the case was previously in this court, we held that there had been no abandonment of the contract, and declared that the plaintiff was entitled, under the proof, to a verdict for the value of the cotton.

Upon the subsequent trial in the court below, the jury returned a verdict in the following words: "We, the jury, find for the plaintiff. Valued" [value] "of Confederate and Mississippi cotton money at time paid, one hundred dollars, with six per cent interest per annum, amounting to one hundred and seventy-eight dollars." And upon this verdict judgment was entered for the plaintiff for one hundred and seventy-eight dollars. A motion was made by the plaintiff to vacate this judgment and award him a writ of inquiry to assess the value of the cotton. This motion was based upon the theory that, inasmuch as the value of the money paid for the cotton was not in issue by the pleadings, and was a matter with which the jury had no concern, so much of the finding as related to it was to be treated as surplusage, and the verdict regarded as a general finding for the plaintiff, with a failure to assess the damages to which he was entitled. This motion was overruled, but a subsequent motion by the plaintiff to set aside the verdict as being contrary to the law and evidence was sustained, and a new trial awarded. The new trial was had, and resulted in a verdict for the defendant. The plaintiff made no motion to set aside this last verdict, nor were any excep-

tions taken upon the last trial. The case is brought here solely upon the supposed error in the action of the court in refusing to award the writ of inquiry upon the former verdict, to which action the plaintiff, at the time, reserved a bill of exceptions.

We think that the court below was right throughout. The verdict in question was manifestly erroneous, and based upon considerations which had no legitimate connection with the case. It was therefore properly set aside and a new trial awarded, but it cannot be regarded as a general finding for the plaintiff without indication on the part of the jury of the amount they intended to award. On the contrary, they quite clearly, though awkwardly, signify their estimate of the damages at one hundred and seventy-eight dollars. While it is manifest by their language that they based this estimate upon improper considerations, and therefore fixed upon an improper sum, it is equally evident that they did arrive at a conclusion, and did express their opinion as to what the amount should be. This being so, no part of it can be treated as a nullity, nor the whole of it as constituting a general finding for the plaintiff, without ascertainment of the sum due. Improper words can only be stricken from a verdict as surplusage, where those that remain constitute a perfect response to all the issues submitted. *Traube v. State*, 56 Miss. 158. The issues submitted here were, whether the plaintiff was entitled to recover, and, if so, how much. If we strike out the obnoxious words, there is no response whatever to the second question, and, while a writ of inquiry should be awarded when there is a failure to assess damages, it is not permissible, where the jury have made a finding, to strike it out, although clearly erroneous and based upon improper considerations, and produce a result that was never intended, by preserving the balance of the verdict.

No motion for a new trial having been made, or exceptions taken to the verdict rendered for the defendant on the last trial, we are precluded from any consideration of its correctness.

*Judgment affirmed.*

## THERESA SHOULTS v. J. M. T. KEMP.

1. PLEADING. *Statute of Limitations. Fraudulent concealment.*

A plea of the Statute of Limitations is demurrable, if the declaration alleges that the defendant concealed the cause of action until the statute applied. Code 1871, § 2158.

2. SAME. *Declaration. Matter of replication.*

While fraudulent concealment is properly matter for replication to such plea, it may, nevertheless, be averred in the declaration, especially if on its face the action is otherwise barred.

3. SAME. *Demurrer. Waiver of defect in declaration.*

The omission to state in such declaration that the concealment was fraudulent is waived, unless objected to by demurrer. Code 1871, § 611.

4. SAME. *Extending demurrer back to first error.*

A demurrer to a plea cannot be extended back, under our system, so as to reach such defect in the declaration.

5. SAME. *Departure. Continuing trespass.*

A replication averring a continuing trespass by abducting a child and preventing it from returning during ten years, is a departure from a declaration which alleges only an abduction ten years ago.

ERROR to the Circuit Court of Alcorn County.

Hon. J. A. GREEN, Judge.

*W. M. Inge*, for the plaintiff in error.

As the defendant concealed the cause of action until 1876, the plea of the Statute of Limitations was no answer to the declaration, and was demurrable. *Johnson v. White*, 13 S. & M. 584; *M'Combie v. Davies*, 6 East, 538. The statute was stopped by the fraud, until the discovery thereof. *Angell on Lim.* § 183; *Stocks v. Van Leonard*, 8 Ga. 511; *Lawrence v. Trustees*, 2 Denio, 577; *Donnelly v. Donnelly*, 8 B. Mon. 113; *First Massachusetts Turnpike v. Field*, 3 Mass. 201. The suit was for the loss of the child's services, an injury continuing up to the trial. Therefore the replication was not a departure, but a full answer to the plea, and the demurrer thereto should have been overruled.

*Whitfield & Young*, for the defendant in error.

The Statute of Limitations began to run at the alleged date



of the trespass, and there is no exception which saves the case from the bar. Concealment, if an answer to the plea, must, at least, have been fraudulent, which is not averred. The replication was a departure from the case stated in the declaration.

GEORGE, C. J., delivered the opinion of the court.

This is an action against the defendant in error to recover damages for enticing away and abducting the minor child of the plaintiff in error. The declaration states that, in the year 1866, the defendant wrongfully and unlawfully enticed, persuaded, procured, and forced her child to depart from and leave her and her service, and that the child continued and remained absent from the plaintiff and her service from that time till the 7th day of July, 1876, a period of ten years. The declaration further avers that the defendant concealed from the plaintiff the presence and whereabouts of her said child, and her cause of action against him, until the year 1876, and that she could not and did not, after the most diligent search and inquiry, ascertain the whereabouts and place of residence of her said child, and her cause of action against the defendant, until the year 1876. The suit was commenced on Sept. 10, 1877. To this the defendant filed, among others, a plea alleging that the plaintiff's cause of action did not accrue within six years next before the commencement of this suit. To this the plaintiff demurred, because there was no denial in the plea of the concealment of the cause of action, as alleged in the declaration. The overruling of this demurrer by the court below constitutes the first error assigned in this court.

Sect. 2158 of the Code 1871 provides that, "If any person liable to any of the actions mentioned in this article shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, the cause of such action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered." The matter of this section would properly constitute a replication to the Statute of Limitations; but this court, in *Jacobson v. Horne*, 52 Miss. 185, held that

matter which might properly be in the replication might also be set out in the declaration, and that this course was not inadmissible under the system of pleading established in this State; and this course appears less objectionable when the matter so set out has the effect to prevent the operation of a defence which otherwise would appear *prima facie* valid from the declaration itself. The declaration in this case undertakes to set out the facts which, under the section of the Code above quoted, would prevent the running of the Statute of Limitations till the year 1876. The attempt to do this is not altogether successful, owing to the failure to state in the declaration that the concealment was fraudulent. The defendant, however, made no objection by demurrer, and must be held to have waived this imperfection.

Nor can the demurrer of the plaintiff to the defendant's plea be extended back to the declaration and made to reach this defect. Sect. 611 of the Code provides that, "When a demurrer shall be put in, the court shall not regard any defect or imperfection in the proceedings, except such as shall be assigned for causes of demurrer, unless something so essential to the action or defence as that judgment, according to law and the right of the cause, cannot be given, shall be omitted." We do not understand this section to repeal the rule of the common law which requires, when a demurrer is put in at any stage of the proceedings by either party, that it shall be extended back to the first defect in the proceedings; but it does prescribe the nature of the imperfection in the former pleading, which can be reached by a demurrer expressly put in to a subsequent pleading. If this were not so, the anomaly would exist of prohibiting, as to pleadings expressly called in question by demurrer, the consideration of defects not specially pointed out and excepted to by the demurrer, unless they are so essential as to prevent the giving of judgment according to law and the right of the case; and at the same time allowing pleadings whose validity has not been expressly put to the test of a demurrer, to be adjudged bad for imperfections of a technical character. The declaration must be regarded as having validly set out the fraudulent concealment of the cause of action; and the defendant's plea, setting up the Statute of Limitations, was

therefore bad, because of its failure to deny the allegation of the declaration in reference to the concealment of the cause of action. The court erred in overruling the plaintiff's demurrer to this plea, and for this reason the judgment must be reversed.

As the cause must be remanded for a new trial, it is necessary to pass on the second assignment of error. After the plaintiff's demurrer to the plea of the Statute of Limitations was overruled, she filed, as recited in the record, two replications. In the first replication, the plaintiff averred that the trespass complained of in the declaration was a continuing one, and that, from the date of the abduction of said child by the defendant, in 1866, "the said child has been detained and held in custody by the defendant up to the 7th day of July, 1876." The defendant's demurrer to the replication was sustained, and we think properly. The declaration complained of a single trespass, — the abduction or enticing away of the child in 1866. It stated that the child remained absent from the plaintiff for ten years, but it failed to state, as this replication does, that the defendant did any thing after the first trespass to prevent his return. The plea of *actio non accrevit infra sex annos* was therefore a good answer to the whole cause of action set out in the declaration, if we omit all consideration of the allegation of fraudulent concealment. The matter set up in this replication is neither a traverse of the plea, nor a confession and avoidance of it, but is an abandonment of the cause of action set out in the declaration, and a setting up of a new cause, — the preventing the return of the child. — not stated or relied on in the declaration. It is an acknowledgment that the cause of action set out in the declaration is in fact barred, and an attempt to recover judgment, notwithstanding this bar, by setting up in the replication a new cause of action. A replication in confession and avoidance is an acknowledgment that the facts stated in the plea, as a ground of defence, are true, and the averment of the existence of other facts not theretofore pleaded, which avoid the legal effect of the matter thus confessed; and its effect is to maintain and support the claim declared on, just as the claim is made in the declaration. It is not, as in this case, a confession that the claim made in the declaration can-

not be maintained, and the setting up of a new and distinct claim, for which the plaintiff seeks to recover. A single trespass, consisting alone in the abduction of the child, is a distinct thing from a continuing trespass, by which the child was kept in custody of the defendant and prevented from returning to his mother for a period of ten years. The wrong, in the latter case, continues up to the moment when the child is permitted to return. The first trespass, the abduction, if it occurred more than six years before action brought, would be barred if there were no fraudulent concealment of the cause of action; but damages could be recovered for the continuing trespass arising from the detention of the child within the period of six years, notwithstanding the bar of the first trespass. This is well settled. See Angell on Lim. § 800. If the plaintiff desired to recover for this continuing trespass, she should have set it out in her declaration. There is no second replication to the defendant's plea of the Statute of Limitations in the record. When the cause is remanded, both parties should be allowed to amend the pleadings in accordance with this opinion. *Judgment reversed and cause remanded.*

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### N. R. SLEDGE v. ANNA BOONE ET AL.

1. CHANCERY PLEADING. *Bill to impeach decree. Infant.*  
An infant may, by original bill, impeach a decree improperly rendered against him.
2. SAME. *Guardian's final settlement.*  
Such a bill, which shows error in a guardian's final settlement, is not demurrable, although called a bill of review.
3. DECREE. *Day to show cause. Statutory extension of the rule.*  
Sect. 1265, Code 1871, is an extension of the chancery rule which gives time to infants, after attaining majority, to reopen certain decrees.

APPEAL from the Chancery Court of Panola County.

Hon. J. B. MORGAN, Chancellor.

The appellee, Anna Boone, a minor, with her husband, filed this bill against her guardian, the appellant, to review and

vacate the decree confirming his final settlement, for error apparent on the record, alleging that, having received ten thousand dollars from her father's estate, the income of which was sufficient to support her, the guardian spent half the principal in two years without order of court, that, soon after her marriage, he made out an erroneous account and induced her, in reliance on his honesty as her brother-in-law, to answer that it was correct, that the account and answer were then filed, and the next day a decree was rendered approving the same and discharging the guardian, and that she has since discovered that there were grave errors and omissions in the settlement. The appellant's demurrer was overruled.

*R. H. Taylor* and *T. W. White*, for the appellant.

1. The bill of review cannot be maintained, because no error is shown on the face of the record, and there is no allegation of newly discovered facts or new matter which has arisen since the decree. The record to be reviewed consists of the guardian's final account, the appellee's answer, and the decree. *Iler v. Routh*, 3 How. 276; *Stark v. Mercer*, 3 How. 877; *Foy v. Foy*, 25 Miss. 207; *Handy v. Cobb*, 44 Miss. 699; *Buffington v. Harvey*, 95 U. S. 99.

2. The bill cannot be maintained under Code 1871, § 1265, because the final settlement was made after the ward's marriage, and her husband was fully competent to make the settlement, although she was a minor. Code 1871, § 1218; Hutch. Code, p. 506, § 135; *Frisby v. Harrison*, 30 Miss. 452. The statute manumits the minor wife, giving her and her husband power to make all settlements with guardians or other persons having her personal estate in their hands.

3. If the bill is brought under Code 1871, § 1265 alone, it can not be filed until the infant becomes of age. While she can maintain a bill of review at any time, she cannot attack the decree, on the ground that it does not bind her because of her infancy, until she reaches such age that the court can make a binding decree. Otherwise she could attack the new decree for the same reason, and the court will not do a vain thing. The cases cited in *Ewell's Lead. Cas.* 236, 237, 238, proceed on the idea that, as decrees giving time after majority to infants to show them unjust were based on a rule of court, and so might

have omitted that clause, the court can make the decree binding on application to reopen ; and hence, those cases have no bearing on the present question, which arises under the statute.

*L. C. Balch*, for the appellees.

1. The final settlement described in the bill is in violation of the statute (Code 1871, § 1218) and erroneous. *Kilcrease v. Shelby*, 23 Miss. 161 ; *Winston v. McLendon*, 43 Miss. 254 ; *Swan v. Gray*, 44 Miss. 398. It is impossible to maintain the proposition that, because the ward was married, the decree binds her like an adult. *Collins v. Spears*, Walker, 310 ; *Meek v. Perry*, 86 Miss. 190. That only adds to minority the disability of coverture. *Moss v. Davidson*, 1 S. & M. 112 ; *Neal v. Wellons*, 12 S. & M. 649 ; *Bowers v. Williams*, 84 Miss. 324. 2 Dan. Ch. Prac. 1210. If the husband had joined the wife in her answer it would not alter this. When *Frisby v. Harrison*, 30 Miss. 452, cited by opposing counsel, was decided, the husband owned the wife's personalty, which the present statute secures to her. The court must protect the minor. *Sullivan v. Blackwell*, 28 Miss. 737. She was incompetent to admit the correctness of the account, and the decree based on her answer is erroneous.

2. If, however, the statute regulating guardians' final settlements had been literally followed, Mrs. Boone, because of her minority, could reopen the decree under Code 1871, § 1265. It is unnecessary for her to wait until she attains full age. The objection that the court will not reopen the decree because a second decree could be impeached in like manner, applies with equal force to the first decree. *Ewell's Lead. Cas.* 236, 237, 238. The rule, however, is that the second decree binds the infant. Great injury may result to the minor if she must wait so long before suing, owing to insolvencies, the death of witnesses, and the other accidents of life.

CAMPBELL, J., delivered the opinion of the court.

By Code 1871, § 1265, no decree affecting the interest of a minor is conclusive until one year after the minor shall attain full age. This is an extension of the established rule of Chancery Courts in certain decrees against infants, before the statute. It is the doctrine of the authorities that

where an improper decree has been made against an infant, it may be impeached by original bill, and that the infant need not wait until attaining full age, but may apply to open the decree as soon as he thinks fit. Story Eq. Pl. § 427; 1 Dan. Ch. Prac. 153, 167, 168; *Bennet v. Lee*, 2 Atk. 487; s. c. Id. 529; *Savage v. Carroll*, 1 Ball & B. 548; s. c. 2 Ball & B. 444. The bill in this case, although called a bill of review, is to be treated as a bill by an infant to open an improper decree prejudicial to her interests in favor of her late guardian. The bill shows error in the settlement. The demurrer admits it, and was properly overruled. *Decree affirmed.*

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C. D. KELLY v. E. D. BROOKS ET AL.

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1. CHANCERY PRACTICE. *Pending appeal. No step in lower court.*

Without a summons and severance no step can be taken in the Chancery Court in a case which is pending in the Supreme Court on appeal by one defendant from a decree overruling a demurrer of all the defendants to the bill.

2. SAME. *Pro confesso. Setting aside. Judicial discretion.*

If such decree is affirmed and the cause remanded, a *pro confesso* entered against a defendant who failed to appeal, after the time for answer allowed by the Chancery Court, but within the time allowed his co-defendant by the Supreme Court, may be set aside in the exercise of a sound judicial discretion.

3. SAME. *Several defendants. Default of one. Final decree.*

No final decree can be rendered against a defendant who has suffered a *pro confesso*, if, upon the answer and proof of another defendant, the complainant is not entitled to relief.

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APPEAL from the Chancery Court of Montgomery County.

HON. R. W. WILLIAMSON, Chancellor.

*Sweatman & Trotter*, for the appellant.

The decree of this court, on sustaining the decree which overruled the demurrer, allowed the defendant who appealed sixty days to answer; but the one who did not appeal was not before this court, and cannot take the benefit of a decree which, if it attempted to affect him, would be *pro tanto* void. While

the complainant can take no final decree against Brooks until the case is determined as to the other defendants, *Minor v. Stewart*, 2 How. 912; *Hargrove v. Martin*, 6 S. & M. 61; yet, by failing to answer, Brooks has rested his case upon the defence which his co-defendants make, and cannot now change his position. The authorities cited by opposing counsel, to the effect that the decree is superseded as to the defendant appealing, do not hold that the case cannot proceed as to defendants who do not appeal.

*Nugent & McWillie*, for the appellees.

As there was no order of severance, the decree of this court on the former appeal, giving time to answer, would not have been void if it had embraced all the defendants. An appeal suspends the operation of the decree appealed from. *Yeaton v. United States*, 5 Cranch, 281; *Paine v. Cowdin*, 17 Pick. 142. It divests the lower court of jurisdiction, and renders void all steps taken therein until the cause is remanded. *Bryan v. Berry*, 8 Cal. 130; *McGlaughlin v. O'Rourke*, 12 Iowa, 459; *Levi v. Karrick*, 15 Iowa, 444; *Helm v. Boone*, 6 J. J. Marsh. 351; *Stewart v. Stringer*, 41 Mo. 400; *Pierson v. McCahill*, 23 Cal. 249; *Stone v. Spillman*, 16 Texas, 432; *Messenger v. Marsh*, 6 Iowa, 491; *Ohio Life Ins. Co. v. Winn*, 4 Md. Ch. 253; *Wade v. American Colonization Society*, 4 S. & M. 670.

CHALMERS, J., delivered the opinion of the court.

The bill was filed against several defendants, all of whom demurred. The demurrer was overruled and the defendants required to answer within sixty days. Only one of them appealed to this court. The decree below was affirmed, and he was given sixty days more within which to answer. Thereafter *pro confesso* at rules was taken against Brooks, one of the defendants who had not appealed. This was done more than sixty days after the decree in the lower court, but within less than sixty days after the decree in this court. The day after the decree *pro confesso* before the clerk was entered, Brooks presented and offered to file his answer, and at the next ensuing term of the court, upon his motion, the *pro confesso* was set aside and the answer permitted to be filed. From this action of the court the complainant appeals.



We think the setting aside of the *pro confesso* was within the sound discretion of the court, which in this instance was not abused. No step could have been taken in this case by the court below while the former appeal was pending in this court, though only one defendant had appealed, there having been no summons and severance; and even if the *pro confesso* had not been set aside, no final decree could have been made against Brooks, if, upon the answer filed and proof taken by his co-defendant, it had been eventually demonstrated that the complainant was entitled to no relief, as has been held in several cases in this court. *Minor v. Stewart*, 2 How. 912; *Hargrove v. Martin*, 6 S. & M. 61. Under these circumstances, it was not erroneous to set aside the *pro confesso* and permit the party to answer.

*Affirmed, and cause remanded.*

GEORGE, C. J., having been of counsel, takes no part in this decision.

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ALFRED LAGRONE ET AL. v. J. M. TRICE.

1. OBSTRUCTION TO WATERCOURSE. *Proceeding to remove. Appeal.*  
No appeal lies to the Circuit Court from a justice of the peace, proceeding under Code 1871, § 1935, to remove a levee, which causes overflow and injury to crops.
2. SAME. *Costs of proceeding. Appeal to Circuit Court.*  
But the justice cannot give judgment for costs in such a case against the defendant, and, if he does, an appeal lies, under Code 1871, § 1332, to the Circuit Court.
3. SAME. *Circuit Court. Jurisdiction. Judgment for costs.*  
The fact that the appellants in such case seek to try anew the question of the levee does not deprive them of the right to have judgment in their favor for the costs.

ERROR to the Circuit Court of Monroe County.

Hon. J. A. GREEN, Judge.

This proceeding under the thirty-fourth chapter of the Code of 1871, "In relation to Obstructions to Watercourses, Mills, and Dams," was begun before a justice of the peace, in accordance with Code 1871, § 1935, by a written complaint

filed by the defendant in error. After the plaintiffs in error were summoned, householders were chosen, as provided by the statute, who examined and reported that the embankment should be cut. The justice issued his precept commanding the plaintiffs in error to remove the obstruction and gave judgment against them for the costs of the proceeding. They appealed to the Circuit Court, where, on motion, their appeal was dismissed and a *procedendo* awarded.

*Houston & Reynolds*, for the plaintiffs in error.

Appeal to the Circuit Court from the judgment of a justice of the peace is allowed by Code 1871, § 1332. Sect. 1935 directs that the three persons shall report in writing to the justice, who makes his confirmation thereof and issues his precept. This is a judgment. Freeman on Judgments, § 19. The judgment was also for costs, and from that the appeal clearly lies. If the appeal was void, the judgment for costs in the Circuit Court was *coram non judice*. *Mayor v. Cooper*, 6 Wall. 247. The judgment in neither court for costs is, however, surplusage; for it will be followed by an execution, levy, and sale, which makes it any thing but surplusage so far as the plaintiffs in error are concerned.

*Murphy, Sykes & Bristow*, for the defendant in error.

No such judgment is directed by Code 1871, § 1935, as that an appeal, under § 1332, can be taken therefrom. Appeals are not matter of constitutional right, but are given by statute, which must be strictly followed. *Porter v. Grisham*, 3 How. 75; *Hardaway v. Biles*, 1 S. & M. 657. The statute under consideration not only gives no appeal, but its intent is plainly to exclude the right. The judgment for costs is mere surplusage. No such order could be made in this proceeding. It is not merely void for want of jurisdiction, but is surplusage and not to be considered. The defendants were no more injured by this judgment for costs, than they would have been had the justice, without complaint, notice, or trial, fined them on general principles. Freeman on Judgments, § 19, cited by opposing counsel, has no application to this case. The judgment for costs in the Circuit Court was right. While that court could not try the case, it had power to charge the appellants with the expense incurred in their attempted appeal.

CAMPBELL, J., delivered the opinion of the court.

The Circuit Court rightly refused to try *de novo* the matter involved in the proceeding before the justice of the peace, because the statute authorizing this proceeding does not provide for or contemplate an appeal; but an appeal did lie from the judgment rendered by the justice for the costs of the proceeding, by virtue of § 1332 of the Code, and the Circuit Court should have sustained the appeal so far as to give judgment in favor of the appellants for the costs.

The justice had no right to tax the costs, because no statute gives costs in such case. He did render judgment for costs. This is a judgment from which an appeal might be taken, and the fact that the appellants sought to avail of their appeal to try anew the matter of the report of the householders, to which they were not entitled, did not deprive them of the right to have an adjudication of the matter embraced in the judgment of the justice of the peace, *i.e.*, the costs.

The judgment of the Circuit Court dismissing the appeal is reversed, and the court proceeding to render the judgment which should have been rendered by the Circuit Court vacates the judgment of the justice of the peace for costs, and dismisses so much of the appeal as relates to the report of the householders and the precept of the justice of the peace upon such report, the costs of the Circuit Court and of this court to be taxed on the defendant in error.

*Judgment accordingly.*

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HENRY DUKE ET AL. v. THE STATE, USE, ETC.

1. PROBATE COURT. *Jurisdiction. Minor residing out of county.*

Under Const. of 1832, art. 4, § 18; Code 1857, p. 459, art. 142, no Probate Court could appoint a guardian for a minor who resided in a county of this State other than that in which the court was held.

2. SAME. *Guardian. Void appointment. Payment.*

If an administrator was so appointed guardian of a distributee of the estate, payment of the distributive share by crediting his account with the estate and debiting that with the ward was a nullity. *Earle v. Crum*, 42 Miss. 165, cited.

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3. EVIDENCE. *Competency. Decree void on its face.*

The record of such guardian's appointment, offered in support of a plea of payment in a suit on the administration bond, should be excluded from evidence by the court, if it shows on its face, by a recital in the bond, that the minor at its date resided out of the county.

ERROR to the Circuit Court of Pontotoc County.

Hon. J. W. C. WATSON, Judge.

*Houston & Reynolds*, for the plaintiffs in error.

Whether the minor resided out of the county in which the Probate Court that appointed the guardian was held was a fact to be determined by the jury, and the record should not have been excluded on that ground. But, even if the fact was established, the appointment was not void. The case of *Herring v. Goodson*, 43 Miss. 392, does not so decide. In those States, where the appointment of a guardian of a minor residing out of the jurisdiction is held to be a nullity, the statutory provisions are explicit. But under statutes like ours, where the language is not of that character, it is held that such an appointment can be made whether the minor resides in the county or not. *Judge of Probate v. Hinds*, 4 N. H. 464. If the minor's residence was a jurisdictional question, the court which made the appointment decided it, and that determination cannot twenty years afterwards be reviewed in a collateral proceeding. *Sprague v. Litherberry*, 4 McLean, 442; *United States v. Bender*, 5 Cranch C. C. 620.

*W. V. Sullivan*, for the defendant in error.

The appointment of the guardian was void, because the minor resided in a county different from that in which it was made. Const. of 1832, art. 4, § 18; Code 1857, p. 459, art. 142; *Herring v. Goodson*, 43 Miss. 392. The same rule applies to an administrator. *Roberts v. Rogers*, 28 Miss. 152; *Cocke v. Finley*, 29 Miss. 127. In Georgia, like laws (Const. of Georgia, Code 1873, § 5100; Cobb's Dig. 286) receive the same construction. *Grier v. McLendon*, 7 Ga. 362; *Darden v. Wyatt*, 15 Ga. 414; *Rives v. Sneed*, 25 Ga. 612. The payment to one not guardian was bad, and the court, not the jury, was to determine whether there was one. The record was properly excluded. 1 Greenl. Evid. § 49, note 3. As the

appointment was a nullity, it could be collaterally attacked, and the infant was not required to sue until of age.

CHALMERS, J., delivered the opinion of the court.

This is a suit upon an administrator's bond to recover the amount due the plaintiff, as one of the distributees of the estate of his deceased grandfather, as shown by the final settlement of the administrator's account. The administrator, being now a non-resident, is not sued; but the suit is defended by his sureties, who plead payment. In support of their plea, they offered a record from the Probate Court of Pontotoc County which showed that, immediately after the administrator's final settlement, he had been by said court appointed guardian of the plaintiff, who was then a minor, and had charged himself as guardian with the amount due by himself as administrator. This record was upon objection excluded, because it showed upon its face (by a recital in the guardian's bond) that the minor was, at the date of the appointment of the guardian, a resident of Tunica County, and thereby demonstrated that the Probate Court of Pontotoc County had no jurisdiction to make the appointment.

This action was correct. By the Constitution of 1832, art. 4, § 18, and by the Code of 1857, p. 459, art. 142, under which this appointment was made, it is manifest that our old Probate Courts were county courts in their dealings with minors, and had no jurisdiction to appoint guardians for those who were not residents of the county, save when they were non-residents of the State, and had property in the county where the appointment was made. The Probate Court of Pontotoc County having no authority to make the appointment, every thing done under it was a nullity. *Earle v. Crum*, 42 Miss. 165.

It follows that the qualification by the administrator as guardian, and the charging of himself in that capacity, did not in any manner affect his liability as administrator, or relieve those who were sureties for him in that behalf.

*Judgment affirmed.*

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82 304

## R. C. BECKETT v. RANDLE DEAN ET AL.

JUDGMENT LIEN. *Deed of trust. Beneficiary's interest.*

The interest of the beneficiary in a deed of trust executed to secure a debt is not the subject of a judgment lien.

APPEAL from the Chancery Court of Clay County.

Hon. L. BRAME, Chancellor.

Randle Dean, an insolvent, executed, on April 2, 1875, a deed of trust on land to secure a debt due H. H. Harrington, who, on May 2, 1877, transferred the note and trust-deed to Toomer, Sykes & Billups, by whom they were subsequently assigned to T. R. Ivy. The appellant, having recovered judgment against Harrington, Oct. 3, 1876, and levied execution, issued June 3, 1878, purchased, at the sale, the land and all Harrington's "right, title, interest and claim at law and in equity," under the deed of trust, and filed this bill to compel Ivy to deliver the note and trust-deed, and to enforce the rights acquired at the sale. On the appellees' demurrer, the bill was dismissed.

*Barry & Beckett* for the appellant.

1. Neither at common law nor under the English statute (29 Car. II. c. 3, § 10), nor in those States which have statutes like the English, can the interest of the mortgagee be sold on execution. *Lynch v. Utica Ins. Co.*, 18 Wend. 236, 250. But our statute is different (Code 1871, § 2295), and, under statutes like ours, such interest has been held salable. *Cotten v. Blocker*, 6 Fla. 1; *Phillips v. Hawkins*, 1 Fla. 262; *Schnell v. Schroder*, 1 Bailey, Ch. 334; *Ferguson v. Lee*, 9 Wend. 258; 8 Mass. 551-560; *Welsh v. Phillips*, 54 Ala. 309. Under our statute, it is held that the estate of the mortgagor can be sold, *Carpenter v. Bowen*, 42 Miss. 28; but not that of a mortgagee. *Buckley v. Daley*, 45 Miss. 338. The latter decision was wrong, but, at all events, the interest of a *cestui que trust* is subject to judgment lien, which the judgment creditor can avail of in equity. *Strickland v. Kirk*, 51 Miss. 795; *Taylor v. Lowenstein*, 50 Miss. 278; *Wiggin v. Heywood*, 118 Mass. 514. The mortgagee has an interest in the property, which is insurable. *Witczinski v. Everman*, 51 Miss. 841; *Kernochan*

v. *New York Bowery Ins. Co.*, 17 N. Y. 428; *Grevenmeyer v. Southern Ins. Co.*, 62 Penn. St. 340; *Wheeling Ins. Co. v. Morrison*, 11 Leigh, 354; *Delahay v. Memphis Ins. Co.*, 8 Humph. 684. He may redeem from tax sale as owner of the land. *Meeks v. Whatley*, 48 Miss. 337; *Burton v. Hintrager*, 18 Iowa, 348; Blackwell on Tax Titles, 422, 424; Cooley on Taxation, 366, 367. His interest is such that, under the Statute of Frauds, the mortgage or trust deed must be in writing. Code 1871, §§ 2302, 2892, 2893, 2896; 2 Bouvier's Law Dic. 198, § 2. He can have an injunction against waste, or a receiver. High on Injunctions, § 314; *Phillips v. Eiland*, 52 Miss. 721. His widow is entitled to dower. *Pickett v. Buckner*, 45 Miss. 226; Park on Dower, 100; Powell on Mortgages, 9, 10. *Parsons v. Welles*, 17 Mass. 419. He is a purchaser under the dower act, *Hinds v. Pugh*, 48 Miss. 268; *Tucker v. Field*, 51 Miss. 191; and under the recording act. *Perkins v. Swank*, 43 Miss. 349; *Claiborne v. Holmes*, 51 Miss. 146; *Schumpert v. Dillard*, 55 Miss. 348. Under the latter he cannot claim as a creditor, but must stand or fall as a purchaser. *Tate v. Liggat*, 2 Leigh, 84; *Wiley v. Boyd*, 38 Ala. 625. His interest is not assignable except in writing. *Warden v. Adams*, 15 Mass. 233; *Fort v. Burch*, 5 Denio, 187; *Fosdick v. Barr*, 8 Ohio St. 471; *Givan v. Tout*, 7 Blackf. (Ind.) 210; *Graham v. Newman*, 21 Ala. 497; *Den v. Dimon*, 5 Halst. (N. J.) 156; *Philips v. Lewistown Bank*, 18 Penn. St. 394; *Wilson v. Kimball*, 27 N. H. 300; *Dwinel v. Perley*, 32 Maine, 197; 1 Wash. Real Prop. 520; 3 Wash. Real Prop. 105. His interest is more than a lien or a pledge. *Barrow v. Paxton*, 5 Johns. 258; *M'Lean v. Walker*, 10 Johns. 471; *Homes v. Crane*, 2 Pick. 607; *Perry v. Craig*, 3 Mo. 516; *Ins. Co. v. Thompson*, 95 U. S. 547; *Ferguson v. Thomas*, 26 Maine, 499; 1 Story Eq. Jur. § 506. If he cannot find the mortgaged property, he can hold a purchaser liable for its proceeds. *Witczinski v. Everman*, 51 Miss. 841. But for Code 1871, § 2150, he could, after condition broken, recover the land. *Benson v. Stewart*, 30 Miss. 49; *Wilkinson v. Flowers*, 37 Miss. 579. He has such an interest in the land as may be assigned for the benefit of his creditors. Burrill on Assignments, 65, 66. And his interest passes under a devise of all his "lands,

tenements and hereditaments." *Jackson v. De Lancy*, 13 Johns. 537; 1 Perry on Trusts, § 336. Yet the decision in *Buckley v. Daley*, *ubi supra*, is based on the ground that the mortgagee has no interest in the land.

2. The Code of 1871, which defines "property" as personal property, and "every estate, interest, and right in lands, tenements, and hereditaments," and provides that the word "land" "shall include all corporeal hereditaments whatever, and any interest therein," enacts that judgment liens shall bind "all the property of the defendant." Code 1871, §§ 830, 2859, 2935. No decision has ever defined the mortgagee's interest as less than a chattel, that is, an interest in corporeal hereditaments less than a freehold. *Carpenter v. Bowen*, 42 Miss. 28; *Buckley v. Daley*, 45 Miss. 388; 1 Perry on Trusts, § 243 and notes; Hilliard on Mortgages, 236, 281; 1 Bouvier's Law Dic. 260, title Chattel Interest; 2 Kent Com. 342. The basis of the decision in *Buckley v. Daley*, *ubi supra*, is Lord Mansfield's opinion in *Martin v. Mowlin*, 2 Burr. 969, which is adopted in *Jackson v. Willard*, 4 Johns. 41. But *Martin v. Mowlin*, and the parallel case of *Casborne v. Scarfe*, 1 Atk. 603, have long since been departed from, both in England and America. *Parsons v. Welles*, 17 Mass. 419, 423; *Vose v. Handy*, 2 Greenl. 322; *Evans v. Merriken*, 8 Gill & J. 39; *Shannon v. Bradstreet*, 1 Sch. & L. 52; *Keech v. Hall*, 1 Doug. 21; *Jackson v. DeLancy*, 13 Johns. 537. Chancellor Kent, in the last case, said that Lord Hardwicke's observation in *Casborne v. Scarfe*, was an extra-judicial *dictum*, and Lord Eldon, in *Braybroke v. Inskip*, 8 Ves. 417, 437, stated that he did not believe Lord Hardwicke ever said so. When the *dictum* was cited in *Ex parte Sergison*, 4 Ves. 147, Sir John Mitford, the Solicitor-General, told the court that Lord Northington and Lord Thurlow had overruled that opinion. Lord Alvanley declared, in *Attorney General v. Buller*, 5 Ves. 389, that the opinion, concurring with the *dictum* imputed to him in *Duke of Leeds v. Munday*, 3 Ves. 348, was incorrect. In *Braybroke v. Inskip*, 8 Ves. 437, Lord Rosslyn is reported to have said that he was overborne in *Attorney General v. Buller*, *ubi supra*, in which he seems to concur with the reported opinion of Lord Hardwicke, and that his opinion was rather with Lord Eldon.



This court has sought, in some cases, to sustain its position by *Hutchins v. King*, 1 Wall. 53, in which the statement is an *obiter dictum* (by Mr. Justice Field, from California, where a mortgage is by statute a mere lien), fortified by *Jackson v. Willard*, *ubi supra*, the cases quoted in *Buckley v. Daley*, and exploded by *Jackson v. DeLancy*, *ubi supra*. But Judge Field's decision is that the mortgagee has an interest sufficient to sue for timber cut from the land.

3. In some States, the mortgage is held to be an interest subject in equity to debts; in a few, it is treated as a mere lien; while in Massachusetts, Maine, Connecticut, New Hampshire, Rhode Island, Vermont, Missouri, Indiana, North Carolina, Minnesota, and Mississippi, it is held to be an estate with all its incidents. Cases decided in States in which a different system prevails are not authority in this State. 2 Wash. Real Prop. 517. The court fell into the error in *Buckley v. Daley* of relying on such decisions. The judgment lien binds all the interest of the debtor equitable as well as legal. *Harrison v. Kramer*, 3 Iowa, 543; *Crosby v. Elkader Lodge*, 16 Iowa, 399; *Blain v. Stewart*, 2 Iowa, 378; *McGan v. Marshall*, 7 Humph. 121; *Twogood v. Stephens*, 19 Iowa, 405. Its effect is extended by 2 & 3 Vict. c. 11, § 5, to estates not liable to execution, but it is made ineffectual against purchasers or mortgagees without notice. Adam's Eq. 132, 133, 326. Our statute (Code 1871, § 830) contains no such exception, and in *Kilpatrick v. Byrne*, 25 Miss. 571, our court declined to restrict the statute or graft upon it an equitable exception. The question of notice forms no element in the case. *New York Drydock Co. v. Stillman*, 30 N. Y. 174; 2 Sugden on Vendors, 655, 656; Adams Eq. 129; Powell on Mortgages, 616-632. The lien binds the note and trust-deed, and the judgment creditor can maintain a bill to have them delivered up to him. Code 1871, §§ 830, 2858, 2859; *Saunders v. Jordan*, 54 Miss. 428; *Taylor v. Lowenstein*, 50 Miss. 278; *Strickland v. Kirk*, 51 Miss. 795; *Wiggin v. Heywood*, 118 Mass. 514.

*White & Bradshaw*, for the appellees.

Under statutes like Code 1871, § 2295, an execution cannot be levied on a trust estate for the debts of the *cestui que trust*. Herman on Executions, § 225. *Presley v. Rodgers*, 24 Miss.

520; *Lucas v. Lockhart*, 10 S. & M. 466; *Boarman v. Catlett*, 13 S. & M. 149; *Wolfe v. Dowell*, 13 S. & M. 103. The case of *Buckley v. Daley*, 45 Miss. 338, has been affirmed in *Taylor v. Lowenstein*, 50 Miss. 278; *Strickland v. Kirk*, 51 Miss. 795; *Clark v. Wilson*, 53 Miss. 119. And this seems to be settled law. 1 Hill on Mortgages, 278; *State v. Laval*, 4 McCord, 336; *Thornton v. Wood*, 42 Maine, 282; Hermann on Executions, § 122; Freeman on Executions, §§ 118, 184. A judgment lien is not a right of property. *Commercial Bank v. Coroner of Yazoo County*, 6 How. 530; *Walton v. Hargroves*, 42 Miss. 18; Hermann on Executions, § 122; Freeman on Executions, § 112. Purchasers of the debtor's personal property, who remove it, cannot be sued for its value. *Dozier v. Lewis*, 27 Miss. 679. The lien binds neither the defendant's equitable estate, nor choses in action. *Coleman v. Rives*, 24 Miss. 634; *Hogan v. Burnett*, 37 Miss. 617; *Black v. McMurtry*, Walker, 389. The bill in chancery will not lie to compel the delivery of the note and trust-deed. Execution can be levied on the chose in action, if the creditor can get possession of it. *Saunders v. Jordan*, 54 Miss. 428. But there is no interest in the land which "may be sold under execution," as provided by Code 1871, § 2295, as has been often decided. Any equitable interest which the *cestui que trust* has is vendible under execution, and the remedy, in any event, is at law.

CAMPBELL, J., delivered the opinion of the court.

The interest of the beneficiary in a deed of trust executed to secure a debt is not the subject of a judgment lien, and his assignee of the debt secured by the deed of trust takes the debt, which is the principal thing, and the security which is an incident, free from any such lien, and secure against the effort of the judgment creditor to reach it in his hands. A deed of trust to secure a debt is but a security — an incumbrance, and not an estate legal or equitable in the beneficiary, who may resort to the property conveyed as a means to the end of obtaining payment of the debt secured, but has no interest in the property or right to it, except as an incident to the chose in action secured by it. *Freeman v. Cunningham*, ante, 67.

*Decree affirmed.*

## R. G. ROBISON ET AL. v. W. D. MILLER, ADMR., ETC.

1. PROCESS. *Constructive service. Member of family. Name.*

A return of service of process by leaving the writ with a member of the defendant's family, over sixteen years of age, is not fatally defective if it does not give the name of such person.

2. SAME. *Delivery of writ. Usual place of abode.*

Such a return is, however, fatally defective unless it states that the delivery was made at the defendant's usual place of abode.

3. INTEREST. *Decree. Excessive rate.*

A final decree foreclosing a lien on land for the purchase-money is erroneous if it provides that the sum due shall bear interest at ten per cent per annum, when there is nothing to show that the debt bore more than six per cent.

ERROR to the Chancery Court of Panola County.

Hon. J. C. GRAY, Chancellor.

*Phipps & Burney*, for the plaintiffs in error.

Where the service is constructive, strict compliance with the statute is essential. *Bustamente v. Bescher*, 43 Miss. 172. Under Code 1871, §§ 701, 702, the name of the person with whom the copy of the writ is left must be stated, for any serious defect in the return of service renders the decree erroneous. *Bacon v. Bevan*, 44 Miss. 293; *Hammond v. Olive*, 44 Miss. 543; *Hargus v. Bowen*, 46 Miss. 72. The case of *Morehead v. Chaffe*, 52 Miss. 161, supports this position.

No counsel for the defendant in error.

GEORGE, C. J., delivered the opinion of the court.

This was a proceeding to enforce a lien on land for a balance of the purchase-money. The defendants were the purchaser and his two sureties. The service of the summons as to the purchaser was in these words: "Executed on Robert G. Robison, by leaving a true copy of the same with a member of his family over the age of sixteen, he being willing to take and deliver the same, as he could not be found in my county after diligent search." On this service, a *pro confesso* was entered and a final decree rendered.

It is now objected that the service is defective, in that it does not give the name of the member of the family to whom

the summons was delivered. We do not regard this objection as well taken. It was objected in *Morehead v. Chaffe*, 52 Miss. 161, that the Christian name of the person was not stated in the return, and it was held that this was unnecessary, and that a substantial and not a literal compliance with the statute was all that was required. The total omission of the name can work no injury. The substantial thing to be done was to leave the summons with a member of the family of the defendant, over the age of sixteen years, and the return states that this was done.

But the return is fatally defective in not stating that this delivery was made at the usual place of abode of the defendant. The statute is express in requiring the delivery to be made at that place, and also in the requirement that, if a member of the family willing to receive the summons cannot be found at the usual place of abode of the defendant, then a copy of the summons shall be posted on the door of the defendant's place of abode. Code 1871, §§ 701, 702. The absence of the defendant from his usual dwelling-place, and from the county, is regarded as temporary, and it is presumed that when the defendant returns to his county he will return to his dwelling, and that he will then receive the copy left for him. It might be that, if the delivery were made at another place, the person receiving the summons would not return in time to deliver it to the defendant, or would lose it before the return, or that it would be lost in the attempt to transmit it by another; and the statute does not contemplate or authorize the employment of any other agent than a member of defendant's family to transmit the summons.

The final decree is also erroneous in providing that the amount ascertained to be due shall bear interest at ten per cent per annum. There is nothing in the bill or exhibits or proof which shows that the debt bore a greater rate of interest than six per cent. On the contrary, the master's report of the amount due shows that interest was calculated at six per cent. The statute provides "that all judgments and decrees, founded on any contract, shall bear interest after the rate of the debt on which such judgment or decree was rendered." Code 1871, § 2279. *Decree reversed and pro confesso set aside.*

## M. T. WOFFORD v. R. E. BAILEY ET AL.

1. **CHANCERY JURISDICTION.** *Removal of clouds. Remedy at law.*  
A bill in chancery can be maintained by the real owner of land, against a person in possession, under Code 1871, § 975, to cancel a void tax-deed and a title-bond from one who never had title.
2. **SAME.** *Writ of assistance.*  
The jurisdiction under the statute is exhausted when the clouds on the title are removed, and the court cannot put the complainant in possession of the land.
3. **RES ADJUDICATA.** *Bill to remove clouds. Ejectment.*  
In the action of ejectment to which the complainant must resort to obtain possession of the land, the defendant may set up any title which he has other than that adjudged void in the chancery proceeding.

APPEAL from the Chancery Court of Sumner County.

Hon. R. W. WILLIAMSON, Chancellor.

The only error assigned by the appellant is the action of the court below in overruling his demurrer which was to the whole of the appellees' bill of complaint.

*Beall & Critz*, for the appellant.

This case involves a construction of Code 1871, § 975. That statute was not designed to draw into the Chancery Court contests as to legal titles. *Carlisle v. Tindall*, 49 Miss. 229. Ejectment suits are not of equitable cognizance. *Huntington v. Allen*, 44 Miss. 654. Nor was the law court to be deprived of the right to try such cases. *Griffin v. Harrison*, 52 Miss. 824. If this bill can be maintained, the action of ejectment is useless. *Glazier v. Bailey*, 47 Miss. 395.

*Martin & Bates*, for the appellees.

The wrong complained of can be more fully redressed in equity than at law, and the court has jurisdiction. Code 1871, § 975; *Ezelle v. Parker*, 41 Miss. 520; *Carlisle v. Tindall*, 49 Miss. 229; *Shivers v. Simmons*, 54 Miss. 520. The complainants, the rightful owners of the land, seek to remove an apparent legal title, which is in reality nothing but a cloud. *Huntington v. Allen*, 44 Miss. 654. It is no contest between legal titles. *Handy v. Noonan*, 51 Miss. 166. When jurisdiction has attached, the court will proceed to grant full relief by putting the real owners in possession.

CHALMERS, J., delivered the opinion of the court.

The bill alleges that the complainants are the real owners of the land in controversy, by descent from their father, and that the defendant is in possession under a title-bond from one who had no title, and also under a void tax-deed. It seeks to have the tax-deed and title-bond cancelled as clouds upon their title, and asks for a writ of assistance to recover possession. The principal point of demurrer is to the alleged want of jurisdiction in a court of chancery, because of the existence of a complete remedy by action of ejectment at law. Under the broad provisions of § 975 of the Code of 1871, the bill is maintainable in so far as it seeks a cancellation and removal of the title-bond and tax-deed as clouds, but is not maintainable in so far as it seeks possession of the land. The Chancery Court has no jurisdiction to award possession in this class of cases. The jurisdiction under the statute is exhausted when the particular muniments of title specified in the bill have been cancelled. Recourse must be had to a court of law to obtain possession; and in the action at law the defendant may set up any title he may have to the land other than that adjudged void in the chancery proceedings. *Ezelle v. Parker*, 41 Miss. 520.

*Decree affirmed.*

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KATE GLOVER v. S. E. HILL ET AL.

WIDOW. *Dower. Homestead exemption.*

The widow of a childless intestate is not entitled, under the Code of 1871, to half his land in addition to the homestead, but only to half including the exemption.

APPEAL from the Chancery Court of Marshall County.

Hon. A. B. FLY, Chancellor.

*Watson & Smith*, for the appellant.

The widow, where there are no children, is, under the Code of 1871, entitled to her dower of half the land of which her husband dies seised, without a will, and also to the homestead exemption. Sections 1956, 2185, give her the homestead, and

under § 1281 she takes half of the residue as dower. *Gibbons v. Brittenum*, 56 Miss. 232. The two statutes are not so repugnant that both cannot stand, but can be reconciled only on the ground urged in this case. To that effect are decisions on similar statutes in other States. In Alabama, the fact that dower has been allotted does not impair the homestead right. *Chisolm v. Chisolm*, 41 Ala. 327; *McCuan v. Turrentine*, 48 Ala. 68. In North Carolina, if the homestead is first laid off, the widow may have dower in the residue. *Watts v. Leggett*, 66 N. C. 197; *McAfee v. Bettis*, 72 N. C. 28. The rights of dower and homestead are held to be distinct in Illinois. *Walsh v. Reis*, 50 Ill. 477. In Wisconsin she can hold the homestead and have dower in the rest of the land, *Bresee v. Stiles*, 22 Wis. 120; while in Massachusetts she is held entitled to homestead in addition to dower. *Monk v. Capen*, 5 Allen, 146; *Mercier v. Chace*, 11 Allen, 194. The same construction prevails in Vermont, Missouri, and Michigan. *Doane v. Doane*, 33 Vt. 649; *Chaplin v. Sawyer*, 35 Vt. 286; *Skouten v. Wood*, 57 Mo. 380; *Wallace v. Harris*, 32 Mich. 380.

*Stith & Stith*, for the appellees.

The cases cited by opposing counsel do not apply; Thompson on Homestead, §§ 561, 562, note 3; but the following are worthy of careful consideration: *Roff v. Johnson*, 40 Ga. 555; *Adams v. Adams*, 46 Ga. 630; *Robson v. Lindrum*, 47 Ga. 250; *Singleton v. Huff*, 49 Ga. 582; *Meyer v. Meyer*, 23 Iowa, 359; *Butterfield v. Wicks*, 44 Iowa, 310; *Bates v. Bates*, 97 Mass. 392; *Wright v. Dunning*, 46 Ill. 271. The two statutes — § 1956 which gives the homestead, and § 1281 which gives dower — are inconsistent. Both include the residence. Thompson on Homestead, § 542; 1 Wash. Real Prop. 326, 329. While the former makes the widow tenant in common, the latter gives her an exclusive right. The first estate terminates when the last child becomes of age, the other is a fee-simple. Of these repugnant statutes, § 1281, which was last adopted, should prevail. *Gibbons v. Brittenum*, 56 Miss. 232. This is consonant with justice and makes the law easy of application, while a contrary rule would give rise to complications growing out of the varying circumstances of different estates and families.

GEORGE, C. J., delivered the opinion of the court.

Mrs. Kate Glover, the appellant, is the widow of Robbin Glover, who died intestate and without children or descendants of children; and the controversy in this case is as to the extent of her right of dower in her husband's lands. The appellant claims that she is entitled to the eighty acres exempt by law from execution, and then to one-half the remainder of the lands as dower.

The Chancellor refused to assign dower in that way, and, as we think, properly. The homestead exemption under our statute embraces eighty acres of land and the buildings thereon, owned and occupied as a residence by the debtor. Code 1871, § 2135. This property, on the death of the husband, descends to his widow and children as tenants in common; and, if there are no children, to his widow; and, if no widow, to his children. Code 1871, § 1956. Under § 1281 of the Code, the widow is entitled to dower; when the husband, as in this case, dies intestate and without descendants, to one-half of his realty in fee. The dower is to include the dwelling and out-buildings. So it is seen that the dower and the homestead are both required to embrace the same property, — the dwelling and out-houses. How the conflict between the widow's right of dower, which is exclusive as to the dwelling, and the right of the children in the exemption, which is that of tenants in common with each other and the widow, is to be settled, it is not necessary for us now to decide. As there are no children here to contest with the widow, the provisions of both statutes — the one on the subject of dower and the other on the descent of the homestead — may be carried out. The widow is entitled to a homestead right in fee, and she is also entitled to dower in one-half of all the lands, including the homestead. When the homestead right is set out she is entitled to all embraced in it, whether it is more or less than what her dower would be when assigned. When the dower is assigned it must embrace, as far as it goes, the homestead right. If, in getting one-half of the whole land, it be necessary to take more than the homestead right, then all the homestead right will be included in it, and so much outside of it as may be necessary to give her one-half of all the land. As to the land outside the homestead,



she would hold it as dower alone; the other she would hold under both titles. The title, however, is in either case an absolute fee-simple. *Decree affirmed.*

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### S. H. BYRD v. THE STATE.

1. **CRIMINAL LAW.** *Husband and wife. Competency of witnesses.*

Under Code 1871, § 759, a wife is not a competent witness against her husband who is on trial for felony.

2. **STATUTES.** *Construction. Legislative misconception.*

A legislative enactment based on a misconception of the law does not, *per se*, change the law so as to make it accord with the misconception. *Davis v. Delpit*, 25 Miss. 445.

**ERROR to the Circuit Court of Lafayette County.**

Hon. J. W. C. WATSON, Judge.

*Tabor & Carter*, for the plaintiff in error.

It was erroneous to allow the wife to testify against her husband. *Cook v. Grange*, 18 Ohio, 526. She is incompetent both because husband and wife are one person in the eye of the law, and also because it would destroy the confidence essential to the marriage relation if they could be witnesses against each other. It cannot be supposed that the legislature designed by Code 1871, § 759, to change a rule which is based on such considerations. But it is evident, as well from a consideration of the old law as from the language of the statute, that the exception was inserted merely from over-caution, to prevent the possibility of drawing from the prior language used the meaning for which counsel for the State contends. Had the intent been to enable her to testify voluntarily, it was easy to express it. So important a change would never have been left to be gathered by implication.

*H. M. Sullivan*, for the State.

The prisoner's wife had the right to testify, which she did voluntarily, after being informed by the court that she was not compelled to give evidence. Code 1871, § 759, has only the effect of preventing the compulsion of husband or wife to

testify against each other. The statutes so far change the common-law rule as to make them competent witnesses in all cases. The exception in the section of the Code under consideration was to guard against the use of force. Unless they are competent witnesses against each other, the exception is meaningless. It must have been inserted with some object. The only conceivable one, is to restrict her competency to the right to testify voluntarily. Unity of the husband and wife, as recognized at common law, has no such place in our system of jurisprudence as to render them one person even in civil affairs, and in the matter of crime the rule was never rigidly adhered to. Public policy, which grows out of the customs and institutions of a people, must necessarily alter with the advancement of society. At this day, neither reason, policy, nor the letter of the law, sanctions the forcible exclusion of the wife as a witness.

*T. C. Catchings*, Attorney General, on the same side.

GEORGE, C. J., delivered the opinion of the court.

The plaintiff in error was indicted for arson and convicted. On the trial, his wife was offered by the prosecution as a witness against him. He objected to her competency; but the court, after informing her "that she need not testify against her husband unless she was willing to do so, and that the law would not compel her," adjudged that she was competent, if she testified willingly. The wife then proceeded to give very material testimony against her husband, a part of which was that the husband asked her to swear falsely in his behalf, as to the whereabouts of the principal witness for the State on the night of the burning. Exceptions were taken to this ruling of the court, as to the competency of the wife, but no additional exception was taken to the admission of the part of her testimony above stated.

At common law the husband and wife were incompetent as witnesses for or against each other. This incompetency was placed by the courts upon two grounds: One, the unity and identity of husband and wife in interest, so that when one was excluded on the ground of interest the other was also excluded; the other had reference to public policy. For, as

Greenleaf in his work on Evidence, vol. 1, § 334, says: "It is essential to the happiness of social life, that the confidence subsisting between husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down or impair the great principles which protect the sanctities of that relation would be to destroy the best solace of human existence." In the Code of 1857, art. 190, p. 510, we find the first provisions in the legislation of this State to remove the incompetency of witnesses on account of interest. By art. 193, on the same page, husband and wife were made competent witnesses for each other in criminal cases.

In *Lockhart v. Luker*, 36 Miss. 68, the High Court of Errors and Appeals, omitting all consideration of the second ground above mentioned of the incompetency of husband and wife as witnesses for or against each other, decided that the wife might be a witness for her husband in a civil suit, because the husband might be a witness in his own behalf. But in *Dunlap v. Hearn*, 37 Miss. 471, the court overruled *Lockhart v. Luker*, and held, in accordance with the above quotation from Greenleaf, that there were grave reasons of public policy for the exclusion of husband and wife as witnesses for or against each other, besides the objection on account of interest; and they excluded, in that case, the wife when offered in a civil suit in behalf of her husband.

Under the Code of 1871, § 760, husband and wife are expressly made competent witnesses for each other in civil cases, and by § 759 it is provided that "husband and wife may be witnesses for each other in all criminal cases, but they shall not be required to testify against each other, as witnesses for the prosecution. Nothing herein contained shall be so construed as to debar full cross-examination by the prosecution of any husband or wife of an accused party who may be placed on the stand for the defence." The learned judge who presided in the court below held that, under this section, the wife may be a voluntary witness for the prosecution, against her husband's consent. We are constrained to differ from him in the construction he has placed on this statute. The statute is in derogation of a very ancient and well established rule of the common law, based, as we have above seen, in great part,

upon grave reasons of public policy having reference to the preservation of the happiness of parties joined together in the marital relation. Statutes which are in derogation of the common law must be construed strictly, so as not to give them an operation and effect beyond the clearly expressed intention of the legislature. *Hopkins v. Sandidge*, 31 Mass. 668. Such statutes are to be construed with reference to the principles of the common law, and it is not to be presumed that the legislature intended to make any innovation on the common law further than the necessity of the case required. *Edwards v. Gaulding*, 38 Miss. 118; *Hollman v. Bennett*, 44 Miss. 322. The rule of the common law excluded them as witnesses both for and against each other, in criminal as well as civil cases. There was no difference as to their exclusion in either class of cases, and the rule was the same whether they were offered as witnesses for or against each other, except in a small class of criminal cases, where the wife was admitted to testify against the husband for her own protection and personal security. This being the state of the law, the legislature, by § 760, made them competent witnesses *for* each other in civil cases, leaving them still incompetent as witnesses against each other in that class of cases. In the section under consideration, the language is, "husband and wife may be witnesses *for* each other in all criminal cases," clearly showing that the legislature intended to apply the same rule as to their competency in criminal and in civil cases. If the legislature had intended to make them witnesses against as well as for each other, it would have been an easy matter to express that intent in unmistakable language. No reason is perceived why the legislature should not have done so, if indeed they had that intent; nor is it easy to give a satisfactory reason why the legislature should make them witnesses against each other in criminal cases, when it is undoubted that they are restricted in civil cases to being witnesses for each other. The whole force of the implication, that the legislature intended to allow one to be a voluntary witness against the other in criminal cases, arises from the use of the words, "but they shall not be *required* to testify against each other, as witnesses for the prosecution," following immediately after the provision allow-

ing them to be witnesses for each other, and as a part of the same sentence. We regard this as rather an over-cautious insertion, to prevent an apprehended construction of the preceding words, than as engrafting a new and independent provision on the statute, which would be the case if it allowed the examination of one against the other, in case the party offered as a witness did not object.

But if we are to construe this language to mean that the legislature thought that by the common law husband and wife might be required to testify against each other when they were allowed to testify in behalf of each other; and to infer that this provision was inserted to prevent the operation of such a rule without the consent of the party offered as a witness, it does not follow that we are to construe the provision as making this erroneously supposed rule of the common law a part of the statutes of the State. An enactment of the legislature based on an evident misconception of what the law is will not have the effect, *per se*, of changing the law so as to make it accord with the misconception. *Davis v. Delpit*, 25 Miss. 445.

For the error in admitting the wife to testify against the husband, against his objection, the judgment is reversed and a new trial granted, and cause remanded. *So ordered.*

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J. W. HOWARD, SHERIFF v. A. PROSKAUER ET AL.

SHERIFF. *Money collected. Motion. Defence.*

A sheriff cannot be compelled by motion to pay over money to a judgment creditor who appears by the writ to be entitled to it, while a bill in chancery, filed by a third person claiming the fund, is pending against the creditor and himself.

ERROR to the Circuit Court of Monroe County.

Hon. J. A. GREEN, Judge.

*Houston & Reynolds*, for the plaintiff in error.

To justify the sheriff in withholding money, received by him under execution or attachment, from the creditor whose lien is the oldest, it must appear that there are parties contesting

the creditor's right seriously and diligently, and by suitable proceedings before a proper tribunal. *Wallace v. Graham*, 18 Rich. 322; *Thomas v. Yates*, 1 McMullan, 179; *Cooper v. Scott*, 2 McMullan, 150; *Dawkins v. Pearson*, 2 Bailey, 619; *Thomas v. Aithen*, 2 Dudley, 292; *Johnson v. Gorham*, 6 Cal. 195; *Waldman v. Broder*, 10 Cal. 378; *McDowell v. Jefferson*, 3 Harr. 25; *Conway v. Campbell*, 11 Mo. 71. The contest is so made in the equity suit, which is a bar to this motion. Jurisdiction has been taken by the Chancery Court, which will proceed to final adjudication, and the sheriff must respond to the decree which will be made. He cannot be liable in both proceedings. An injunction would have prevented the officer from paying over the money, but the course adopted was as effective.

*Gholson & Houston*, for the defendants in error.

The suit in equity by the junior creditors cannot interfere with the proceeding at law between the senior creditor and the sheriff, who is first amenable to the Circuit Court for his failure to execute its process. Code 1871, §§ 229, 332; *Curry v. Lampkin*, 51 Miss. 91. If the former desired the Chancery Court to acquire jurisdiction over this fund, they should have secured the latter by an injunction bond. *Henderson v. Thornton*, 37 Miss. 448. Under the circumstances, the Chancery Court has no jurisdiction of the subject-matter. High on Injunctions, §§ 131, 251; *Boker v. Curtis*, 2 Edw. Ch. 111; Code 1871, §§ 1044, 1045. But the Circuit Court, having first obtained jurisdiction of the fund, should retain it. High on Injunctions, §§ 17, 47; *Green v. Robinson*, 5 How. 80. The sheriff should return the money and state the conflicting claims to that court.

CHALMERS, J., delivered the opinion of the court.

Sundry creditors of A. Strouse sued out attachment writs against him. The eldest of these was at the suit of A. Proskauer & Co., and it, together with all the writs issued, were levied upon a stock of goods which were sold as perishable in their nature and the money realized was held by the sheriff. At the May Term, 1879, of the Circuit Court of Monroe County, judgments were obtained against Strouse by all the

attaching creditors; but that of A. Proskauer & Co. was of superior lien because of the priority of levy. Before the money realized by sale of the goods was paid over to them, the other creditors united in a bill filed in the Chancery Court, to which Proskauer & Co., Strouse, and the sheriff, Howard, were made parties, alleging that the debt upon which Proskauer & Co.'s judgment was based was fictitious and fraudulent, and praying that said judgment might be vacated and annulled, and that the money in the hands of the sheriff might be paid over for ratable division among themselves. They asked also for a temporary injunction restraining the sheriff from paying over the money to Proskauer & Co. pending the litigation, but, failing to give the necessary bond, no writ of injunction was issued. The sheriff answered, admitting the holding of the money by him, and asking leave to pay it into court to abide the event of the litigation. Proskauer & Co. demurred to the bill, and at the September term of the court the demurrer was argued and taken under advisement by the Chancellor; but a few weeks thereafter, and before his decision was announced, a term of the Circuit Court having arrived, Proskauer & Co. made in that court the present motion against the sheriff to compel him to pay to them the money in his hands. As an answer to this motion, the sheriff informally pleaded the pendency against himself of the chancery litigation, verifying his plea by a production of the record. The court below adjudged the defence insufficient, and gave judgment on the motion against him, from which he appeals.

The question presented is, whether it is a defence to a motion against a sheriff, for failure to pay over money to the party shown by the process in his hands to be entitled to it, that a suit has been instituted against himself and the plaintiff in execution by some third person claiming a better right to the fund. It is conceded that the Chancery Court has jurisdiction to entertain the bill filed by the junior creditors for the purpose of vacating the judgment obtained by Proskauer & Co.; and if there was ever any doubt on the subject it was put at rest by the case of *Henderson v. Thornton*, 37 Miss. 448, a case quite similar in some of its legal aspects to the one at bar. But in that case the parties seeking to annul the prior

judgment obtained an injunction against the sheriff, restraining the paying over of the money to the plaintiff in execution, so that no question arose as to his liability to a motion in the Circuit Court for a failure to do so ; and, while it is conceded here that the motion would not be maintainable in the face of an injunction, it is claimed that nothing short of such prohibitory order can excuse the failure to obey the peremptory command of the writ under which the money has been realized. If such would be the effect of an injunction, why should not the pendency of the litigation have the same effect ?

An interlocutory injunction is negative, not affirmative, in its character. It rarely confers any right upon the party seeking it, except to preserve the *status quo*, so that the same measure of justice may be meted out at the end of the controversy as was possible at its inception. But, if it is brought to the knowledge of a tribunal which has jurisdiction only over some of the parties in interest that a litigation is pending in another court of competent jurisdiction to which all persons interested have been made parties, it should be an extreme case that would justify a peremptory judgment in favor of those who alone have access to the court pronouncing it. In the case at bar, the Circuit Court could take no cognizance of the matters involved in the chancery suit, because the junior creditors had no *locus standi* in that forum, while the Chancery Court on the other hand, having all the parties before it, could do complete justice ; and while it is true ordinarily that the plaintiff who has reduced his claim to judgment and made effective an execution issued upon it has a summary right to demand the money in the hands of the officer, yet this right is not absolute. It will never be exerted where there is a probability that the officer may be made liable to some other person who has actually instituted legal proceedings with that view until there has been a determination of the latter issue. *Wilson v. Wright*, 9 How. Pr. 459 ; *Payne v. Kershaw*, Harper, 275 ; *Newland v. Baker*, 21 Wend. 264.

We have repudiated in this State the doctrine that money in the hands of an officer is *in custodia legis* in such sense that it cannot be reached by a creditor of the person for whose benefit it is held, and have declared that such money is subject



to garnishment as if in the hands of a private person. *Burleson v. Milan*, 56 Miss. 899. Certainly, that which may be done by garnishment may be done by plenary proceedings in equity to which all claiming an interest in the fund in controversy are made parties; and so it would seem that, as a creditor of A. Proskauer & Co. could have reached this fund by garnishment and thereby precluded them from maintaining a motion against the sheriff to compel its payment to themselves, the same result should follow in behalf of those who have in a competent tribunal instituted proceedings to show that they are, and that Proskauer & Co. are not, legally entitled to it.

The judgment of the court below not being in accordance with these views is reversed, and the motion against the sheriff dismissed.

*Judgment accordingly.*

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#### EX PARTE J. W. GORE.

##### REWARD FOR CAPTURE. *Fugitive homicide. Official duty.*

A constable who apprehends a homicide within his county, fleeing before arrest, and delivers him up for trial, simply performs his duty (Code 1871, § 280), and is not entitled to the reward provided in Code 1871, § 2786, for persons not under official obligation to take prisoners.

##### APPEAL from the Circuit Court of Union County.

Hon. J. W. C. WATSON, Judge.

A man who had killed another in Union County, and was fleeing from justice, was, on information derived through a telegraphic despatch and without a warrant, first arrested on the train when it stopped at West Point in Clay County by the appellant, who was marshal of the town, and *ex officio* constable for the county. After delivering his prisoner to the sheriff of Union County, the appellant petitioned the Circuit Court for the statutory reward, which was refused upon the ground that it was his official duty to apprehend the fugitive.

*Barry & Beckett*, for the appellant.

As the appellant did not act in his official capacity, but made the arrest without a warrant on the faith of a telegram, and left his bailiwick to deliver the prisoner for trial, all on his per-

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sonal risk and at his individual expense, he is entitled to the reward. *Davis v. Munson*, 48 Vt. 676; *Russell v. Stewart*, 44 Vt. 170; *Hayden v. Souger*, 56 Ind. 42. To defeat the recovery, it must be shown that the officer had a warrant, under which it was his duty to take the homicide into custody. *Gillmore v. Lewis*, 12 Ohio, 281; *Brown v. Godfrey*, 33 Vt. 120.

*T. C. Catchings*, Attorney General, *contra*.

The ruling of the court is in accordance with public policy, and supported by reason and authority. *Day v. Putnam Ins. Co.*, 16 Minn. 408; *Marking v. Needy*, 8 Bush, 22.

CAMPBELL, J., delivered the opinion of the court.

The constable did only his duty in making the arrest. It is the duty of a constable "to keep and preserve the peace within his county," and "faithfully to aid and assist in executing the criminal laws of this State." Code 1871, § 280. He assumes this obligation in entering the office, and is not entitled to any pay except that specifically provided. The reward offered by § 2786 of the Code was designed to induce the arrest of fleeing homicides by persons not under an official obligation to do it. *Warner v. Grace*, 14 Minn. 487. *Judgment affirmed*.

## W. C. BRIDGES ET AL. v. BOARD OF SUPERVISORS OF CLAY COUNTY.

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### 1. APPEAL. *Not matter of right. Regulated by statute.*

Appeals are not matters of right, but are allowable only in the cases and on the terms prescribed by the statute, which are conditions precedent that must be complied with in order to give the appellate court jurisdiction.

### 2. BOARD OF SUPERVISORS. *Circuit Court. Practice on appeal.*

On appeal to the Circuit Court from a decision of the board of supervisors, under Code 1871, § 1383, the judge must try the case on the bill of exceptions signed by the president of the board, and can render no judgment but that of affirmance or reversal.

### 3. SAME. *Appeal. Trial and judgment. No jurisdiction by consent.*

The board of supervisors has no power to consent to any other mode of trial, or to give the Circuit Court jurisdiction to render a judgment

not authorized by the statute. *Yalobusha County v. Carbry*, 3 S. & M. 529, distinguished.

4. COUNTY. *Public money. Donation. Jurisdiction.*

The judgment of any court ordering a donation to be made out of the public treasury is void. Claims against a county cannot be adjudicated on motives of generosity.

5. SAME. *Res adjudicata. Estoppel by judgment.*

Parties to the record, in such case, which discloses no valid demand, are not concluded by an adverse judgment therein, from prosecuting any legal claim against the county.

ERROR to the Circuit Court of Clay County.

Hon. JAMES M. ARNOLD, Judge.

*Barry & Beckett*, for the plaintiffs in error.

The appeal and agreement in this case are in accordance with the proceedings which were held valid in *Yalobusha County v. Carbry*, 3 S. & M. 529. The power of the board of supervisors to bind the county as to the mode of trial on appeal by agreement is fully recognized in that case. The provision in Code 1871, § 1383, that the case "shall" be tried on the bill of exceptions is not mandatory, but directory only. *Cason v. Cason*, 31 Miss. 578; *Malcom v. Rogers*, 5 Cowen, 188. If the statute is mandatory, the only proper judgment was of affirmance, not of dismissal.

*White & Bradshaw*, for the defendants in error.

The Circuit Court had no jurisdiction to try the case by jury *de novo*, and the agreement could not confer jurisdiction. Code 1871, § 1383; *Lyles v. Barnes*, 40 Miss. 608; *Lester v. Harris*, 41 Miss. 668. If a jury trial was desired, the proceeding should have been under § 1384. The case of *Yalobusha County v. Carbry*, 3 S. & M. 529, which arose under a different statute, is no authority for the construction for which opposing counsel contend, and it has been partially overruled by *Dis-mukes v. Stokes*, 41 Miss. 480. The dismissal was proper, because, no bill of exceptions having been signed, the Circuit Court had no jurisdiction of the attempted appeal.

GEORGE, C. J., delivered the opinion of the court.

This record presents the following state of facts: Certain citizens and tax-payers of Clay County presented their petition to the board of supervisors, asking for an additional allowance

of six hundred and fifty dollars to the plaintiffs in error, over and above their contract price for building certain bridges. The ground upon which the allowance is asked is that the contractors are young and inexperienced, and incautiously became the lowest bidders for the work at a sum much less than its value. The board very properly refused the petition, as it was manifestly an application for a bounty out of the county treasury, which the board had no lawful authority to grant. Thereupon the contractors asked for an appeal to the Circuit Court; which appeal was granted; and, by the consent of the board and the appellants, a bill of exceptions was waived; and the further agreement was entered into that the petition should be tried in the Circuit Court *de novo*, and upon evidence to be introduced in that court by both parties. In the Circuit Court, the board moved, first, to affirm their judgment, which being overruled, they then moved to dismiss the appeal for want of jurisdiction; which motion was sustained, and the appellants excepted, and sued out this writ of error.

The statute which authorizes appeals from boards of supervisors to the Circuit Court (Code 1771, § 1883) provides that any person aggrieved by any judgment or decision of the board may appeal to the next term of the Circuit Court, and may embody the facts and evidence in a bill of exceptions, which shall be signed by the president of the board; and it shall be the duty of the board to grant the appeal when demanded; and the clerk shall transmit the proceedings to the Circuit Court, which shall hear and determine the same on the case presented by the bill of exceptions, as an appellate court, and shall affirm or reverse the judgment. It has been settled from an early day in this State that appeals are not a matter of right, and are allowable only in cases provided for by statute; and then only on the terms prescribed by the statute; that these terms must be strictly complied with, and are conditions precedent to the jurisdiction of the appellate court. *Parker v. Willis*, 27 Miss. 766; *Hardaway v. Biles*, 1 S. & M. 657; *Porter v. Grisham*, 3 How. 75; *Carmichael v. Trustees*, 3 How. 84; *Pickett v. Pickett*, 1 How. 267.

It is true that in *Yalobusha County v. Carbry*, 3 S. & M. 529, 546, under a statute which allowed appeals by "bills of

exceptions or *certiorari*," the High Court of Errors and Appeals sustained an appeal where a bill of exceptions was waived; but this was upon the express ground that when a cause was removed into the Circuit Court by *certiorari* a trial was had *de novo*, and the cause proceeded with as if it had been first instituted in that court. See pp. 548, 549. Although that rule is not recognized now in this court, yet it is seen that the High Court, in allowing the validity of the appeal in that case, was careful not to give it an effect which the court did not deem could be secured by another mode equally allowed by the statute. Under our present Code, as we have seen, the provision is express that the trial in the Circuit Court shall be before the judge, and upon the case made by the bill of exceptions, and that the only judgment which can be rendered is either of affirmance or reversal. It is not in the power of the board of supervisors to consent to any other mode of trial, or to give to the Circuit Court a jurisdiction to render a judgment not authorized by the statute.

But, even if this power existed, the Circuit Court rightly dismissed the appeal. The claim, on its face, was an application to the board of supervisors to make a donation to the contractors. The board had no power to appropriate the money of the county in that way; and, if it had done so, each member voting for it would, under the statute, have been liable on his bond for the amount. Acts 1876, p. 46; Acts 1877, p. 16. The Circuit Court was equally powerless to make such an appropriation, and its judgment ordering it, if the nature of the claim appeared by the record, would have been a nullity. Certainly, no additional validity would have been given to it by submitting the claim to a jury. Fortunately, there is no provision in our laws by which any court is authorized to determine that a donation shall be made out of the public treasury. Courts may enforce the legal or equitable rights of parties, but they are without jurisdiction to adjudicate and enforce claims which rest solely in motives of generosity. If the plaintiffs in error have any just legal claim against the county, it is not disclosed by this record, and they are therefore not concluded by the judgment here from prosecuting it in any court of competent jurisdiction.

*Judgment affirmed.*

## CHARLES CHAFFE ET AL. v. W. J. HUGHES.

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80 7881. DEED OF TRUST. *Stipulation to ship cotton or pay commissions.*

A stipulation in a deed of trust executed by a merchant to secure a *bona fide* debt due a cotton factor, that he shall ship a specified amount of cotton to the latter during the year for sale on commission, or pay the commissions if not shipped, is valid.

2. SAME. *Stipulation as to appropriation of payments.*

If the stipulation comes after the granting and conditional clauses of the deed, which purports to secure nothing but the debt, the commissions are not ordinarily protected; but a further stipulation allowing the factor at any time to apply payments to unsecured debts without impairing the security, protects any indebtedness arising at or before final settlement.

APPEAL from the Chancery Court of Yalobusha County.

Hon. A. B. FLY, Chancellor.

*R. H. Golladay*, for the plaintiffs in error.

The plaintiffs in error would not have accepted the deed of trust or given time to Hughes unless he had agreed to ship the cotton. The stipulation to pay commissions whether the shipment was made or not, was valid. *Lengsfeld v. Richardson*, 52 Miss. 443. It was for a consideration, and the time of payment was given. The occupation of the respective parties, their situation territorially, and the customs of the business, are in conformity with the contract. There is no complaint in the bill that the notes were given for too much, or illegally discounted. If the commissions were not secured in terms by the deed of trust, that instrument stipulated that the plaintiffs in error might apply payments to any unsecured debt, and they accordingly applied Hughes's payments to the commissions which he owed, leaving the trust-deed unsatisfied. The application can be made now. There is no limit. The latter stipulation makes the trust-deed a security for any indebtedness which arises between the parties prior to a final settlement.

*G. H. Lester*, for the defendant in error.

It is proper, in computing the sum due under the trust-deed, to exclude the damages resulting from not shipping

the cotton. Such sum was not secured by that instrument. If the stipulation as to commissions is legal, the plaintiffs in error can sue for such damages as they can show that they have sustained, but cannot collect the damages by the summary sale enjoined in this suit. The stipulation allowing the plaintiffs in error to apply payments to unsecured debts cannot avail, because the payments were made before the cotton season opened; and long afterwards Hughes, in reply to their first demand for damages for his failure to ship, claimed that he should not be held for the commissions. Hughes never agreed that his property might be sold for his default in shipping. His answer is, *In hæc fœdera non veni*.

CHALMERS, J., delivered the opinion of the court.

This is a bill filed to have entry of satisfaction of a trust-deed, upon the allegation that the debts secured by it have been paid. The facts are as follows: W. J. Hughes, a merchant in Water Valley, executed for the benefit of Chaffe, Hamilton & Powell, a firm composed of Charles Chaffe and others, cotton-factors in New Orleans, a trust-deed upon real estate, to secure payment of two notes, aggregating two thousand eight hundred and fifty-seven dollars, and bearing interest at the rate of ten per cent per annum, and a further advance thereafter to be made of fifty dollars. The trust-deed contained a further stipulation that Hughes should ship to the New Orleans firm at least two hundred and fifty bales of cotton during the year, for sale on commission, and that he should pay commissions at two and one-half per cent, on the value of that amount of cotton, whether in point of fact he should ship so much or not. Finally it was expressly agreed that all payments made by Hughes, whether in money or by the delivery of cotton, should be applied as the New Orleans firm saw fit; and whether applied to the debt secured or to any other debt then existing or thereafter to accrue between the parties, such application, no matter when made, or to which account credited, should not in any manner operate to impair, lessen, or prejudice the debts secured and intended to be secured by the instrument or the security thereby provided. Twelve

bales of cotton only were shipped by Hughes during the year, but the notes and further advances specially protected by the instrument were paid in money, or very nearly so (we have not made an accurate calculation as to this). Nothing was paid on the claim for commissions on cotton not sent, and the validity of this claim, and the question whether it is protected by the trust-deed, are the principal issues presented by the record.

Neither in the granting nor in the conditional clauses of the trust-deed is there any allusion to this obligation to pay commissions on cotton not sent, nor are any debts specified as protected by it save the notes and the future advance of fifty dollars. The obligation to send the cotton, and to pay commissions on it whether sent or not, comes after the granting clauses of the deed, and also after the clauses providing for a sale of the property upon default made in payment of the notes and the fifty dollars advance; and but for the provision giving power to the creditors to apply payments to any indebtedness existing between the parties, it is clear that an indebtedness springing out of a failure to meet this obligation would not be protected by the instrument. But this provision is both comprehensive and explicit. It provides that the creditors "shall have the exclusive right to apply the net proceeds of sale of all cotton shipped, and all payments of money made, to the payment of any indebtedness which may be due now or which may hereafter become due;" that such application may be made at any time, and shall not in any manner impair or lessen the security created by the instrument. Plainly this transforms it from a mortgage for the protection of certain specified debts into a security for any valid indebtedness that may arise between the parties before or even at the time of a final settlement between them. If, at the date of making such settlement, the creditors should discover an indebtedness of any sort which had been previously overlooked, or which then for the first time arose, they would have a right to apply any payments which had been previously made to this new indebtedness, and still leave the security in full force as to the particular debts specified in the deed. This is the same thing as declaring that the instrument shall protect any and all debts



that may arise and remain unpaid at the time of final settlement between the parties.

The only question therefore to be determined is, whether the stipulation that the debtor should forward a certain amount of cotton, and, if he failed so to do, should pay commissions on it as if it had been sent by him and handled and sold by his factors, is valid, and imposes a legal liability upon the debtor if unfulfilled. This question, novel in this State, we find settled by the Supreme Court of the United States in *Cockle v. Flack*, 93 U. S. 344. It is there held that, if it appears from all the facts in the case that such a contract has been entered into with no expectation on either side that the produce shall in fact be forwarded, but as a mere device to enable the lender of money to obtain an usurious rate of interest, it will be void; but that if made in good faith between parties, one of whom is engaged in forwarding and the other in selling the articles specified upon commissions, it will be valid. It is said that in such cases there is something more than a mere loan of money; there is a combination of the money advanced and of the attention and skill promised in selling the produce. The factor has provided himself with clerks and a place of business. At heavy expense, and perhaps by the payment of license fees, he has placed himself in condition to transact such business as may be intrusted to him. A part of the necessary outfit for doing so is his money, or the credit that will enable him to procure it. Another essential element is the preparation and capacity to transact the business. When therefore he is applied to for the one, he may well estimate something for the exercise of the other, and stipulate that, while his money brings him lawful interest, his skill and business preparation shall yield something additional. The expense of making the preparation has already been incurred, and as he stands ready to exert the skill, the party who has failed to call for its exercise cannot complain that he obtained no benefit from it, when he has expressly contracted that he will pay whether he obtains its benefits or not. This reasoning we deem satisfactory, and as there is nothing in the case at bar to suggest a device to evade the usury laws, but every thing to show a *bona fide* expectation of receiving and selling the cotton, we hold the

stipulation valid, and the liability incurred by its non-fulfilment as covered by the trust-deed.

The decree of the Chancellor, not being in accordance with these views, is reversed, and the bill dismissed.

*Decree accordingly.*

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DAVID LAKE v. CITY OF ABERDEEN.

1. MUNICIPAL CORPORATION. *Nuisance. Charter. Ordinance.*

Although the charter of a city empowers the mayor and selectmen, by ordinance, to prevent nuisances and dangerous manufactories, and regulate the latter, they cannot, on a petition of citizens, deal thus with a flouring mill, unless it is shown by the record to fall within some law or general ordinance previously passed.

2. SAME. *Mayor's Court. Appeal. Jurisdiction of Circuit Court.*

If such charter gives the right of appeal to every party to a cause or prosecution, from the final judgment or sentence of the mayor to the Circuit Court of the county, the latter should not dismiss the appeal from the mayor's judgment condemning such mill as a nuisance.

ERROR to the Circuit Court of Monroe County.

Hon. J. A. GREEN, Judge.

This petition, by James M. Green, U. McAllister, and Unity Hampton, addressed to the mayor and selectmen and filed in the Mayor's Court of the city of Aberdeen, represents that the petitioners own and occupy residences, where they have lived for years, in a part of said city dedicated to residences, and in the principal streets; that some years ago David Lake leased lots in their vicinity, and built an unsightly structure of inflammable wood, representing that it was to be used for a planing factory, but afterwards attached an engine and fixtures, and has since continued to use it as a grist and flouring mill; that the engine and boiler are old and much worn, and make a great and unusual noise, and are often so threatening that those in charge run for their lives, leaving the machine to its fate; that the chimneys are low and not provided with spark-catchers, nor are any of the usual safeguards used about the mill, and several times the petitioners'

houses have been set on fire; that Lake has erected another house near the mill, where he stores cotton seed, and, the ground being low and wet, decaying material accumulates about the two buildings; that horses on the streets are frightened, and the lives of persons passing endangered by the machinery, which, with the bad odors and constant peril to health and property, render the mill and other structure a nuisance; and that Lake, having purchased the lots, proposes to enlarge his building and perpetuate the business. The prayer is that the mill be abated, or that Lake erect a proper building and remove the decaying material, and that proper guards be applied against explosions, noise, and fires; or for such other and further relief as the petitioners may be thought entitled to receive. Lake was summoned; and the mayor adjudged the mill a nuisance, ordered the engine and boiler to be repaired, safety walls to be built, and spark-catchers applied to the chimneys, and directed the city marshal to see to the execution of the judgment. Although the charter granted the right to appeal, in the language quoted in the opinion, to any party to a cause or prosecution in the Mayor's Court, the appeal of Lake from that judgment was dismissed by the Circuit Court, and his motion to dismiss the case denied. Hence this writ of error.

*Murphy, Sykes & Bristow*, for the plaintiff in error.

1. While the city authorities may prescribe fire limits, *Alexander v. Town Council*, 54 Miss. 659, or assign bounds to a noisome trade, *Green v. Lake*, 54 Miss. 540, it is not shown that any restrictions have been put upon flouring and grist mills in Aberdeen, or that Lake's mill is located out of such precincts. Until that fact appears, the mayor has no jurisdiction. Power to prevent and remove nuisances is given to the Council of Mayor and Selectmen, and cannot be delegated to the mayor or any other officer. Acts 1854, pp. 222, 226; *State v. Street Commissioner*, 36 N. J. 283. In the absence of general laws of the State or ordinances of the city prescribing what are nuisances, the municipal authorities cannot, by merely declaring a building to be one, subject it to removal. 1 Dillon Mun. Corp. § 308; *Yates v. Milwaukee*, 10 Wall. 497; *Underwood v. Green*, 42 N. Y. 140.

2. The right of appeal from the mayor to the Circuit Court is secured in all cases by the charter. Acts 1854, pp. 234, § 28. Such right will not be taken away, unless the legislative intent to that effect is very clear. *Starr v. Trustees*, 6 Wend. 564; *Tierney v. Dodge*, 9 Minn. 166; 1 Dillon Mun. Corp. § 368. The power is jealously maintained, and is deemed necessary to prevent oppression. *Jackson v. People*, 9 Mich. 111. For no purpose can the finding of a mayor or other municipal officer affect the final disposition of a matter of this character. *Manhattan Manuf. Co. v. Van Keuren*, 23 N. J. Eq. 251; *Weil v. Ricord*, 24 N. J. Eq. 169.

*E. O. Sykes*, on the same side, also made an oral argument.

*Reuben Davis*, for the defendant in error, argued the case orally, and filed a brief.

This proceeding was conducted before the mayor of Aberdeen, under an ordinance of the city prescribing the method of abating nuisances, but giving no appeal except to the Council of Mayor and Selectmen. The Mayor's Court is a Justice's Court for the trial of cases usually determined in such tribunals, and from it the charter gives an appeal to the Circuit Court of Monroe County. But this proceeding is of a different class, and before the mayor as a city official, not as a justice of the county. Possessing the constitutional power, the legislature by charter authorized the council to prevent and remove nuisances, which implied the right to determine the means. 1 Dillon Mun. Corp. §§ 58, 59. The council has, in the exercise of its legislative functions, prescribed a mode of procedure, which the State courts cannot control. 2 Dillon Mun. Corp. § 478. One of the chief objects of municipal government is to preserve the health, safety, and comfort of the citizens, and reasonable ordinances or by-laws for such purposes have always been sustained both in this country and in England. 1 Dillon Mun. Corp. § 303. As the proceeding is under a valid ordinance, the remedies provided by that law must be exhausted before resort is had to the general laws of the State. And, even in such case, the mode of correcting an error would be by the common-law writ of *certiorari*, and not by appeal.

CAMPBELL, J., delivered the opinion of the court.

The plaintiff in error was entitled to an appeal to the Circuit Court from the "final judgment or sentence of the mayor," in the "cause or prosecution" by which his business was condemned as a nuisance; and his appeal was improperly dismissed by the Circuit Court.

The mayor and selectmen of Aberdeen are vested by its charter with the power, by ordinance, "to regulate and prevent the carrying on of manufactories dangerous in causing or promoting fires," and "to prevent and remove all nuisances." We are not informed by the record how this power has been exercised, and what ordinances on the subject have been passed. The elaborate petition by which this proceeding was commenced contains no allusion to any ordinance of the city. There is in it no averment that the things complained of are a nuisance within any ordinance of the city. The prayer of the petition is that the "steam mill of the said David Lake be declared a nuisance, and that it be taken down and removed, or that he erect a proper building," and do certain other things mentioned; and the petition concludes with a prayer for "such other and further relief" as the Council of Mayor and Selectmen may think the petitioner entitled to. The petition is addressed "To the Mayor and Selectmen." It appears to be an application to the mayor and selectmen to examine into the matters complained of in the petition, and to declare the mill a nuisance, and to order it removed, or that certain other things mentioned shall be ordered to be done. While the charter confers the power on the municipal authorities of the city to pass ordinances on the subject of nuisances, it does not confer the right to declare that a particular structure or business, not condemned by any law or ordinance, is a nuisance, and to have the structure removed or the business stopped or interfered with. Such a power is not to be tolerated. It would place "all the property in the city at the uncontrolled will of the temporary local authorities." The city may have such ordinances as its charter authorizes, and a structure erected or a business conducted in violation of such ordinance may be dealt with in accordance with the ordinance, but it is not allowable for one or more citizens to exhibit a bill

of complaint, alleging that certain buildings or operations are a nuisance, not within any law or ordinance previously passed and operating on all, but because of certain facts set forth in the petition; and to procure a decree to abate such alleged nuisance, not as being a violation of a precedent enactment, but by virtue of a decree of the mayor and selectmen that it is so in the given case. The property and pursuits of the citizen are not held by so frail and uncertain a tenure as the mere declaration of a body acquiring temporary control of the affairs of a city or town. There must be a law applicable to the subject, and it must be legally tried and determined whether the law has been violated. If the city of Aberdeen has an ordinance applicable to the case set forth in the petition, and the proceeding was under such ordinance, it should have been made to appear so.

*Judgment reversed and petition dismissed.*

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JOHN M. HIGDON v. ELIZABETH HIGDON ET AL.

1. RESULTING TRUST. *Advancement. Presumption. Evidence to rebut.*

A purchase of land by one who pays the price and has the title made to another, for whom he is under a legal or moral obligation to provide or towards whom he has placed himself *in loco parentis*, is presumed to be a settlement and not a trust for the purchaser, but such presumption may be rebutted by evidence.

2. SAME. *Presumption of advancement. Subsequent acts.*

A trust does not result, in favor of a brother who purchases a homestead for his sisters to whom he stands *in loco parentis*, and takes the title to the eldest and his aunt, although they subsequently permit him, owing to reverses of fortune, to live and build there, and the aunt reconveys to him her moiety.

APPEAL from the Chancery Court of Marshall County.

Hon. A. B. FLY, Chancellor.

The appellant, who resided in Tennessee, and was there engaged in business, purchased at a sheriff's sale, for his unmarried aunt and sisters, the homestead where the latter had resided from infancy. Their parents were dead, and their aunt lived

with them. To him, as their only brother, the sisters looked for protection and support, which he was accustomed to provide as under a moral obligation, and standing towards them *in loco parentis*. He paid for the land, and had the title made in the names of his aunt and his eldest sister. Years afterwards, his buildings in Tennessee were destroyed by a storm; and, after an unsuccessful attempt to resume business, he settled on this land and was kindly received by his surviving sisters. The eldest died, leaving the appellant and the younger sisters her sole heirs. After his aunt had conveyed to him by deed with full covenants, for an expressed valuable consideration, her undivided interest, he built a new house for his wife and family on another part of the land. This bill, brought to establish a resulting trust in the moiety of his eldest sister, alleges that the title was made to her and his aunt merely through a fancy. His sisters defend on the ground that it was an advancement, by one standing *in loco parentis*, to secure them a home.

*Watson & Smith*, for the appellant.

In the purchase of land, where the title is conveyed to one person, while another pays the consideration, a resulting trust arises if the parties are strangers. 1 Perry on Trusts, § 126; Hill on Trustees, 146; 2 Sugden on Vendors, 431. The presumption of an advancement from a brother to his sisters does not exist, unless he stands *in loco parentis*; and even then it may be rebutted by evidence manifesting an intention on his part that the nominal purchaser shall hold as trustee. 2 Sugden on Vendors, 442, note *g*; Hill on Trustees, 160, 165. The doctrine of resulting trusts is applicable to this case, *Capers v. McCaa*, 41 Miss. 479; *Wilson v. Beauchamp*, 44 Miss. 556; and the facts show the appellant's intention that the homestead should belong to him. At most his purpose is doubtful, and the burden of proving intention is on those who claim the advancement. Hill on Trustees, 156, 157.

*Stith & Stith*, for the appellees.

Presumption of a resulting trust is rebutted, and that of an advancement raised by taking title to one for whom the purchaser is under moral or legal obligation to provide. 1 Perry on Trusts, §§ 143, 144, 147; Lewin on Trusts, 227, 228;

*Weare v. Linnell*, 29 Mich. 224; *Fowkes v. Pascoe*, 32 L. T. N. S. 545; *Murless v. Franklin*, 1 Swanst. 13. The same rule holds as to one to whom he has placed himself *in loco parentis*. Hill on Trustees, 97; *Dyer v. Dyer*, 2 Cox, 92; *Ebrand v. Dancer*, 2 Ch. Cas. 26; *Loyd v. Read*, 1 P. Wms. 607; *Benbow v. Townsend*, 1 M. & K. 506. It is a question of intention. *Maddison v. Andrew*, 1 Ves. 58; *Capers v. McCaa*, 41 Miss. 479. The trust results *eo instanti*, if at all. Lewin on Trusts, 221; *Gee v. Gee*, 32 Miss. 190. The purchaser's subsequent acts or declarations are inadmissible. Hill on Trustees, 105; *Finch v. Finch*, 15 Ves. 43. After the nominal purchaser's death, parol evidence is said to be inadmissible to establish the trust. Saunders on Uses, 259; Roberts on the Statute of Frauds, 99; Hill on Trustees, 92; *Clark v. Danvers*, 1 Ch. Cas. 310. A trust may be proved as to part, and rebutted as to the remainder. *Lane v. Dighton*, Ambler, 409; *Mahorner v. Harrison*, 13 S. & M. 58. The evidence to establish it must be clear and explicit. *Carey v. Callan*, 6 B. Mon. 44. The presumption is in favor of the legal title, and cannot be overthrown by weak or contradictory evidence. *Murless v. Franklin*, 1 Swanst. 13; *Grey v. Grey*, 2 Swanst. 594; Hill on Trustees, 97.

CAMPBELL, J., delivered the opinion of the court.

If the purchaser of land pays the price and has the title conveyed to another, for whom he is under a legal or moral obligation to provide, or towards whom he has placed himself *in loco parentis*, the purchase will be presumed to be a settlement, and not a trust for the purchaser. This presumption may be rebutted by evidence, but it cannot be affirmed that the Chancellor decided erroneously in holding in this case that the legal presumption attending the purchase by the complainant was not rebutted.

*Decree affirmed.*



## L. B. ADAMS, ADMR., ETC. v. SUSAN ADAMS.

**MARRIAGE.** *Cohabitation. Const. art. 12, § 22.*

A man and woman whose connection began in the lifetime of a former wife, who died in 1867, if they desired marriage, lived together as husband and wife, and so held themselves out to the world, at the ratification of the Constitution of 1869, were, by art. 12, § 22, thereof, united in matrimony, without any new consent or formal ceremony.

**APPEAL** from the Chancery Court of Tishomingo County.

Hon. L. HAUGHTON, Chancellor.

Bryant Adams was engaged to be married to the appellee; but the marriage was prevented by his relatives, and, in 1833, he married Ritta Smith in Pitt County, North Carolina, where they all then resided. Ritta became the mother of four children, of whom the appellant is the eldest. After her death, Bryant went again to see the appellee, they were again engaged, and agreed to run away and marry, but his relatives again interposed, and Bryant married Sallie Smith. Some time afterwards, and while he was living with Sallie, he came to the appellee, and told her that she was the only woman he ever loved. She replied that he was the only man that she had ever loved. And before any cohabitation they then agreed to live together as husband and wife till death parted them. That was the only agreement ever entered into between them to live together as husband and wife; no such agreement was ever afterwards mentioned, but from that time they so lived together without any change whatever. The marriage with Sallie Smith was in 1844, and with her Bryant lived about three years, during which time he became intimate with Susan, moved her into a house on his farm, and, while living there, she became the mother of two of his children. On that account, Sallie left Bryant in 1847, taking the negroes, who had been given her by her father, and went to her brother, with whom she stayed until 1867, when she died. No divorce was ever sought or obtained. After Sallie left him, Bryant took Susan and the children of Ritta, and, leaving North Carolina, set out for Arkansas. When

they left, they agreed to keep secret the fact that they were not married, and not to write back, in order that their acquaintances there, being ignorant of their whereabouts, should be unable to expose them. They stopped in Alabama and remained there a year, living and holding themselves out to the world as husband and wife. In 1848, they moved to Tishomingo County, Mississippi, where they remained until 1878, when Bryant died. During all this time, they were generally regarded as man and wife, and lived together as such, and the fact that they were not married was not divulged.

On Dec. 1, 1869, the State Constitution was ratified by the people of Mississippi. Sect. 22 of the twelfth article thereof is as follows: "All persons who have not been married, but are now living together, cohabiting as husband and wife, shall be taken and held, for all purposes in law, as married, and their children, whether born before or after the ratification of this Constitution, shall be legitimate, and the legislature may, by law, punish adultery and concubinage."

No agreement was made by Bryant and Susan to accept the constitutional provision as establishing any new relation between them. There was no difference or change in their manner of living during any of the years from 1867 to 1871 inclusive. Susan never knew any man but Bryant. He was the father of her two other children born before his wife died in 1867, and he always recognized Susan's four children as his, and so treated them to the hour of his death. Bryant Adams was the owner of certain property in Tishomingo County. The appellee's petition for dower therein against his heirs and the administrator of his estate was answered by the latter, who denied that she had been the decedent's wife, and appealed from the decree awarding dower, upon the foregoing as the agreed facts of the case.

*Beall & Critz*, for the appellant.

The intercourse of the appellee with Bryant Adams was begun in adultery and disregard of the rights of his lawful wife. The contract, dictated by the spirit of free love, is a stab at one of the holiest relations of life, and, if made a precedent, will shake the foundations of society. 1 Bishop on Marriage and Divorce, § 8. To change adultery into matrimony, more

proof of an acceptance of the altered state is required than a mere continuance of illicit intercourse after all impediments to marriage are removed. *Rundle v. Pegram*, 49 Miss. 751. The constitutional provision was for the benefit of emancipated slaves, who could not marry while in bondage; and, for it to operate in any case, the cohabitation must have been in good faith, and violative of no person's rights. These persons were impostors, deceiving their neighbors. If they were living in lawful wedlock, or so intended it, why did they fear exposure? There was no agreement between them to accept the new organic law, or any difference or change in their manner of living, or any declaration or public act from which such agreement might be inferred. *Floyd v. Calvert*, 53 Miss. 37. The section was designed to protect those who, in a moral sense, were living together as husband and wife, but was never intended as a general amnesty by which all sins against the institution of marriage should be condoned.

*J. A. Brown*, for the appellee.

As these old people wanted to marry, regarded each other as husband and wife, and were so regarded by every one, their good faith having stood the test of twenty-five years, and lasted till death, when the impediment of the former wife was removed, they were married by the subsequent Constitution. Prior to the ratification of that instrument, the marital and parental relations were fully adopted, and, a respectable and respected family, they had children who called them father and mother, and knew nothing to the contrary. There could be no external relation after the Constitution different from what it was before. But those relations previously existing, by recognition of the parties and others, the Constitution, as said in *Rundle v. Pegram*, 49 Miss. 751, "established legal relations." If they truly regarded each other as husband and wife, it was natural and proper for them to live after the ratification of the Constitution just as before. To have had a public ceremony after Mrs. Sallie Adams's death would have injured both them and their children, by exposing the fact of their having no marriage before. An agreement to accept the Constitution, made after its passage, would have been unnatural, and utterly inconsistent with their prior lives. To hold such a

contract essential would be to defeat the Constitution, for no one but Mrs. Kitty Denny ever dreamed of going through the ceremony described in *Floyd v. Calvert*, 58 Miss. 37. These persons, however, agreed "to live together as husband and wife till death parted them." Pursuant to that contract, they so lived for nearly thirty years. Their purpose never changed, but grew stronger with age. When the impediment was removed, the Constitution carried out their design.

CHALMERS, J., delivered the opinion of the court.

The agreed state of facts brings the parties, we think, fairly within the provision of Const., art. 12, § 22. They were persons who at the date of the ratification of the Constitution had not been married, but were living together as husband and wife, and such persons were by the provision in question made husband and wife. The clause was undoubtedly intended principally to apply to our colored population, but it embraces all who fall within its provisions. These parties desired to form a matrimonial connection. They were prevented from doing so during the life of the first wife by the law of the land, and, after her death, by a desire to conceal from their acquaintances in their new home the unlawful connection existing between them. While in this condition, living together as husband and wife, holding themselves out as such, desiring between themselves and supposed by all who knew them to be such, the previous disability having been removed by the death of the former wife, the Constitution went into effect and obviated the necessity of any new consent or formal ceremonies. The case is essentially different from *Rundle v. Pegram*, 49 Miss. 751, and *Floyd v. Calvert*, 58 Miss. 87.

*Decree affirmed.*

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W. L. MASK v. JOHN F. RAWLS.

TRESPASS ON THE CASE. *Malicious prosecution. Defective affidavit.*

Trespass on the case lies for malicious prosecution, although the affidavit which was the commencement of the prosecution fails to charge a crime known to the law.

ERROR to the Circuit Court of Chickasaw County.

Hon. J. A. GREEN, Judge.

In this action of trespass on the case by the plaintiff in error against the defendant in error, for malicious prosecution, there was testimony that the latter prosecuted the former before a justice of the peace for larceny, and that the accused was arrested on the warrant, examined and discharged. The affidavit and warrant, and the record containing the judgment of the justice were produced, by which it appeared that the charge in the affidavit was that W. L. Mask killed the affiant's hog and carried it home. On motion of the defendant in error, the affidavit was excluded from evidence.

*W. F. Tucker*, for the plaintiff in error.

The legal insufficiency of the affidavit, which has performed its office, by causing the plaintiff's arrest and trial on a charge of an infamous crime, cannot be invoked for the protection of the prosecutor, who has brought as much opprobrium upon his victim as if the paper had been technically correct. Trespass on the case can be maintained if the prosecution was malicious, although it was irregular, or in a court without jurisdiction. 1 Chitty Pl. 183, 184. So, where the warrant does not describe the offence charged, or where the affidavit misdescribes it, or where the warrant is not sealed. 2 Greenl. Evid. § 449; 1 Hilliard on Torts, p. 427, § 14; *Forrest v. Collier*, 20 Ala. 175; *Collins v. Love*, 7 Blackf. 416; *Pedro v. Barrett*, 1 Ld. Raym. 81; *Pippet v. Hearn*, 5 B. & Ald. 634; *Chambers v. Robinson*, 2 Strange, 691; *Wicks v. Fentham*, 4 T. R. 247; *Long v. Rogers*, 17 Ala. 540; *Ewing v. Sanford*, 19 Ala. 605; *Kline v. Shuler*, 8 Ired. 484; *Stancliff v. Palmeto*, 18 Ind. 321; *Smith v. Deaver*, 4 Jones, 513. Arrest and imprisonment are not an incident, but the gravamen of the charge. *Goslin v. Wilcock*, 2 Wils. 302; *Smith v. Cattell*, 2 Wils. 376; *Elsee v. Smith*, 1 Dowl. & Ryl. 97; s. c. 2 Chit. 304; *Morris v. Scott*, 21 Wend. 281; *Stone v. Stevens*, 12 Conn. 219; *Hays v. Younglove*, 7 B. Mon. 545.

*Lacey & Baskin*, on the same side.

Had the affidavit sufficiently charged the offence, case would have been the proper remedy; 1 Chitty Pl. 152, 153; 3 Black. Com. 127; and it is likewise proper, although the affidavit is

defective. 2 Wheaton's Selwyn, 1078, 1079; 2 Greenl. Evid. § 452; 1 Chitty Pl. 184; 1 Hilliard on Torts, 427; Hilliard on Remedies for Torts, 239. Malice and falsehood constitute the gravamen of the charge, and case will therefore lie. *Morris v. Scott*, 21 Wend. 281; 1 Chitty Pl. 184; *Long v. Rogers*, 17 Ala. 540; 1 Hilliard on Torts, 427. Under our system of pleading, however, there is no distinction between case and trespass, so that the suit could have been brought in either form.

*Buchanan & Houston*, for the defendant in error.

The affidavit was excluded, not because it failed to describe the offence with technical accuracy, but because it charged no crime. The warrant and subsequent proceedings are in such case void. *Steel v. Williams*, 18 Ind. 161; *Maher v. Ashmead*, 30 Penn. 344; *Baird v. Householder*, 32 Penn. 168; *Morgan v. Hughes*, 2 T. R. 225; *Braveboy v. Cockfield*, 2 McMullan, 270; *Ivy v. Barnhartt*, 10 Mo. 151; *Bixby v. Brundige*, 2 Gray, 129; *Marshall v. Betner*, 17 Ala. 882. The charge must be of a crime, not a mere trespass. *Frierson v. Hewitt*, 2 Hill (S. C.), 499. In this case there was no criminal prosecution. *Leigh v. Webb*, 3 Esp. 165. The remedy in cases of this character is an action for slander, if the charge is of a scandalous nature, or trespass *vi et armis* if there was an arrest. *Turpin v. Remy*, 3 Blackf. 210; *Bodwell v. Osgood*, 3 Pick. 379; *Allen v. Greenlee*, 2 Dev. 379.

CAMPBELL, J., delivered the opinion of the court.

The exclusion of the affidavit which was the commencement of the prosecution complained of as malicious was erroneous. The gravamen of the action is the malicious prosecution of the plaintiff, upon a false and unfounded charge, whereby damage was done to him. It matters not that the affidavit does not contain a charge of felony or other crime. It served as the basis of a warrant for the arrest of the party charged, and the sting of malice and falsehood is just as hurtful when inflicted through the medium of an affidavit legally insufficient, as if it was drawn with technical precision. It is settled by respectable authorities that case, as contradistinguished from trespass *vi et armis*, is maintainable in such

case, and this view fully comports with our system of remedies. *Hays v. Younglove*, 7 B. Mon. 545; *Morris v. Scott*, 21 Wend. 281; *Stone v. Stevens*, 12 Conn. 219.

*Judgment reversed and new trial awarded.*

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W. A. ALCORN ET AL. v. THE STATE, USE, ETC.

1. CHANCERY CLERK. *Official bond. Extent of liability.*

The sureties on a chancery clerk's official bond are not liable for money received by him from the sale of assets of a decedent's estate, which he made as special commissioner appointed by the court to complete the sale.

2. ESTATES OF DECEDENTS. *Special commissioner to sell land.*

A special commissioner to sell a decedent's land cannot be appointed under the Act of April 1, 1872, amending Code 1871, § 1159 (Acts 1872, p. 27), unless the decedent's estate is insolvent.

ERROR to the Circuit Court of Tallahatchie County.

Hon. SAM. POWEL, Judge.

*FitzGerald & Marshall*, for the plaintiffs in error.

The clerk, under the facts of this case, could not be appointed special commissioner to complete the sale, and while he may be individually liable for meddling with the decedent's estate, his sureties cannot be held, for it was no part of his official duty to administer on the estate. This case is anomalous. No administrator existed when the clerk was ordered to perform the duties of one, and he did so without giving any bond. The case is governed by the probate practice, not by that of the equity side of the court.

*Bailey & Bailey*, for the defendant in error.

The Chancery Court has power to appoint the clerk master or commissioner in cases of this kind. *Goff v. Robins*, 33 Miss. 153. And, if the appointment is proper, the sureties on his official bond are responsible for his acts. They are liable for money which he receives in executing a decree which names him commissioner to carry it into effect. It was essential that a commissioner should be appointed to execute the decree, and the jurisdiction of the court continued for that purpose.

GEORGE, C. J., delivered the opinion of the court.

G. A. Nicholetts was elected chancery clerk of Tallahatchie County for the term of four years from the first Monday in January, A.D., 1872, and the plaintiffs in error were the sureties on his official bond. This action was brought on the relation and for the use of "Robert Reddick as special commissioner in chancery, in the matter of the estate of James K. Orr" against said Nicholetts and the sureties on his official bond as chancery clerk, to recover the sum of two hundred and fifty-eight dollars, which it is alleged that Nicholetts, as special commissioner in the matter of the same estate, and the predecessor of the relator, had received and collected by virtue of his said office of commissioner. The defendant filed a special plea, averring in substance that the executrix of said Orr had obtained an order or decree in 1873, directing her to sell the real and personal estate of her testator for distribution and the payment of debts, and that, having executed said decree in part, she married again and her husband had failed to give bond for her as required by law. She was in July, 1873, removed from her office as executrix, and by the same decree said Nicholetts was appointed special commissioner and directed to complete the sale and distribute the proceeds among the creditors and heirs; and further, that after the said removal of said executrix no administrator *de bonis non cum testamento annexo* had ever been appointed. The plaintiff's demurrer to this plea was sustained, and, the defendants declining to plead further, judgment was rendered against them for the amount sued for; from this judgment the sureties sued out this writ of error.

At the date of these proceedings, the only statute in force, which authorized the appointment of a special commissioner to make a sale of realty of a decedent's estate in course of administration to pay debts, was the "Act to Amend and Extend the Provisions of Section 1159 of the Revised Code of 1871," approved April 1, 1872. (Acts 1872, ch. 19, p. 27.) The statute provides only for the appointment of a special commissioner to make a sale of the realty of a decedent when the executor or administrator shall fail to give bond and security for the application of the proceeds, and when the estate is insolvent;



and then it requires such special commissioner to give bond for such application before making said sale.

We think the plea set up a good defence, because, — First. It appears that this was not an insolvent estate. Second. The statute requires the special commissioner to give a special bond, to account for the proceeds of the sale before he makes it, and does not contemplate or authorize the imposition of this duty to sell and distribute the proceeds on the clerk of the court as such ; and the clerk's official bond covers only such acts and duties as he is by law, or may be by order of the court, required to perform as clerk.

*Judgment reversed and cause remanded.*

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M. C. CUMMINGS v. M. HARRISON.

1. COVENANT OF WARRANTY. *Ejectment. Notice to defend.*

A warrantor who has verbal notice of an ejectment suit against his warrantee and opportunity to defend, although no such demand is made on him, is concluded by the result, and cannot show title when sued on his warranty.

2. SAME. *Assumpsit. Purchasing paramount title.*

Assumpsit will lie, under the rule laid down in *Kirkpatrick v. Miller*, 50 Miss. 521, as well by a remote as by the immediate vendee of a warrantor to recover money paid in purchasing a paramount title.

APPEAL from the Circuit Court of Itawamba County.

Hon. J. A. GREEN, Judge.

The appellee, who is the vendee of the appellant's vendee (each deed containing a general covenant to warrant the title to heirs and assigns), sued the appellant in assumpsit for money paid to buy a paramount title, under which a judgment had been recovered in ejectment for possession of the land. When sued, the appellee verbally notified the appellant, who was present at the ejectment trial and advised as to the defence, and yet sought to defeat this action on the ground that the suit might have been successfully resisted.

*J. L. Finley and Newnan Cayce*, for the appellant.

1. The only reason why assumpsit will lie by the covenantee against his covenantor is that a parol contract existed between them prior to the deed. *Doe v. Bernard*, 7 S. & M. 319; 1 Greenl. Evid. § 283. But with a remote vendor, no contract ever exists except the covenant in the deed. Assumpsit is an undertaking, express or implied, to perform a parol agreement. 1 Bouvier Law Dic. 159. The appellant could not complain of covenant, for he has covenanted, but he has made no parol agreement. Assumpsit should be confined to the immediate parties to the covenant.

2. Mere knowledge of the ejectment suit and presence at the trial is not sufficient; the appellant should have been made a party on formal notice. He could not defend without the appellee's consent. *Linderman v. Berg*, 12 Penn. St. 301. The ancient practice of vouching to warranty has been substituted by notice, which should be written and accompanied by a requirement of the covenantor to defend the suit. Rawle on Covenants, 218, 221, 232. The dictum in *Pickett v. Ford*, 4 How. 246, is in conflict with the decisions in other States where the point has been directly presented. *Somers v. Schmidt*, 24 Wis. 417; *Miner v. Clark*, 15 Wend. 425.

*W. L. Clayton*, for the appellee.

1. If the appellee had sued in covenant, the authorities are ample that the action could be maintained against the remote vendor. 1 Chitty Pl. 17, note 1; *Wyman v. Ballard*, 12 Mass. 303; *Clark v. Swift*, 3 Met. 390. The remedy by assumpsit is at least as broad as the other. Under our statute choses in action are assignable. No reason can be given why this suit will not lie to recover the money which was paid for the appellant's use. *Kirkpatrick v. Miller*, 50 Miss. 521.

2. If the appellee notified the appellant of the ejectment suit, or if the latter appeared in court and assisted in the defence by his presence and advice, he is bound by the judgment in that case. *Pickett v. Ford*, 4 How. 246. The case is approved in *Kirkpatrick v. Miller*, *ubi supra*, and the same principle is decided in *Barney v. Dewey*, 13 Johns. 224.

*J. A. Brown*, on the same side.

If one who is under obligation pays what another could have been legally compelled to pay, he may recover from the

other the money expended for his use. 2 Greenl. Evid. §§ 114, 115 and notes. That is the practice, and the case resembles that of several principals and one surety where each of the former are severally liable for the whole sum. *Duncan v. Keiffer*, 8 Binney, 126. The expense of a reasonable and prudent compromise for another's benefit is always recoverable. 1 Smith's Lead. Cas. 70; *Hulett v. Soullard*, 26 Vt. 295.

CAMPBELL, J., delivered the opinion of the court.

In order to bind the warrantor by the result of an action of ejectment against the party holding under him, and to conclude him from showing title when he is sued on his warranty, it is not necessary for the notice to him by the defendant in the action of ejectment to be in writing or in any particular form, or that a demand should be made of him to defend the action. If the warrantor has reasonable notice of the action against his warrantee, and an opportunity to defend it, he will be bound by the result, and when sued on his warranty, cannot be heard to show that the action of ejectment might have been successfully defended. He should have interposed such defence then, or ever afterwards be silent. The notice in this case was sufficient.

The rule announced in the case of *Kirkpatrick v. Miller*, 50 Miss. 521, applies in favor of a remote vendee as well as the immediate vendee of a warrantor. There is no error in the record.

*Judgment affirmed.*

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T. R. DRAPER, TRUSTEE v. W. W. PERKINS ET AL.

1. DEED OF TRUST. *Description of chattels. Rule of construction.*

The descriptive words in a deed of trust should be so construed as to sustain the instrument, when it can be done without violence to the language employed.

2. SAME. *Ambiguity. Admissibility in evidence.*

A deed of three bales of middling cotton, averaging five hundred pounds each, which the grantor may raise or have cultivated "during the present year on the Burleson or Barker plantation in Tunica County, Mississippi, or elsewhere in said State," is admissible in evidence. *Kelly v. Reid*, ante, 89, cited.

ERROR to the Circuit Court of Panola County.

Hon. SAM. POWEL, Judge.

*Fitz Gerald & Marshall*, for the plaintiff in error.

The description is sufficient to allow proof *aliunde* that the three bales of cotton sued for, and no more, were raised by the grantor during the year 1877 on the Burleson or Barker plantation in Tunica County. It makes a *prima facie* case, and was admissible in evidence. *Kelly v. Reid*, *ante*, 89. At most, the ambiguity was latent and explainable.

*Standifer & Stone*, for the defendants in error.

The deed of trust presents a patent ambiguity, and was properly excluded from the evidence. *Baldwin v. McKay*, 41 Miss. 358; *McGuire v. Stevens*, 42 Miss. 724; *Brown v. Guice*, 46 Miss. 299; *Bowers v. Andrews*, 52 Miss. 596; *Yandell v. Pugh*, 53 Miss. 295; *Kelly v. Reid*, *ante*, 89; *Starkie Evid.* 655; 1 Greenl. Evid. §§ 294, 301. The three bales of cotton were neither separated nor identified. 2 Kent, Com. 496; *Benjamin on Sales*, §§ 310, 319, 346, 352, 353. But the description is three bales of a large crop to be raised somewhere in the State.

GEORGE, C. J., delivered the opinion of the court.

The case originated before a justice of the peace, and appears to be a proceeding by a trustee in a deed of trust to recover the value of three bales of cotton which it is alleged the defendants in error converted to their own use. The case comes here on a special bill of exceptions taken by the plaintiff in error to the ruling of the circuit judge excluding from the jury the deed of trust. The deed was excluded upon the ground that the description of the property attempted to be conveyed in it was void for uncertainty. This description is as follows: The grantor conveys "three bales of middling cotton, averaging five hundred pounds each, which he may raise or have cultivated by any hands under his control during the present year on the Burleson or Barker Plantation, in Tunica County, Mississippi, or elsewhere in said State."

The objection is, that this means three bales of a larger amount of cotton to be raised; and under that interpreta-

tion the description would be void. *Kelly v. Reid, ante*, 89. But we are to construe the language of the instrument, if we can do so without violence to it, so as to sustain the contract rather than avoid it. It is not to be presumed in a case of doubt, that the parties deliberately made an instrument which was of no legal value whatever; on the other hand, the presumption must be indulged, unless the contrary appears from the language employed, that the parties meant to make a legal and binding contract. This presumption authorizes us to construe the meaning of the clause above quoted, to be a mortgage of three bales of cotton, which three bales the mortgagor would raise, and no more. With this construction, the deed of trust should have been admitted in evidence. What would be the result in case it should appear that the grantor raised more than three bales, and that no particular three bales had been set apart to and accepted by the trustee or beneficiary before the alleged conversion, we are not called upon to decide, as no question is raised by this record, except as to the admissibility of the deed of trust in evidence.

*Judgment reversed and cause remanded.*

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OSCAR BERCIER ET AL. v. DANIEL MCINNIS.

RECEIPT. *Effect in evidence. Prima facie import.*

The *prima facie* import of a receipt "in full" or "on account," is that expressed by its language, subject to the right of either party to show that it is erroneous; and there is no *prima facie* presumption that a receipt for so much money "for timber purchased" is in full satisfaction of the price.

ERROR to the Circuit Court of Jackson County.

Hon. J. S. HAMM, Judge.

*R. Seal*, for the plaintiffs in error.

The instruction requested should have been given. The receipt, which was for so much money for timber purchased, speaks for itself. It was not for a part, but for all the timber

sold and delivered at the time. The presumption upon the face of the receipt is that it was for a payment in full.

*C. H. Wood*, for the defendant in error.

The instruction assumed that the receipt on its face was in full for all demands, which is not the case, and it was, therefore, properly refused. *Prima facie*, it simply acknowledges the receipt of so much money for timber, without excluding the idea that more was due at the time. It is not a receipt "in full," and the court would have erred in so charging the jury.

CHALMERS, J., delivered the opinion of the court.

The plaintiff sold the defendants a lot of timber, receiving five hundred and eighty-eight dollars and twenty-two cents in payment therefor, or on account thereof, and signed the following receipt: —

"Received, Scranton, Miss., Dec. 28, 1875, from Messrs. Bercier & De Smet five hundred and eighty-eight  $\frac{22}{100}$  dollars, for timber purchased.

\$588  $\frac{22}{100}$

D. McINNIS."

He subsequently brought this suit and recovered judgment for an alleged balance due him. The testimony as to the amount of the timber and the mode of measurement differed, and the defendants asked the court to charge the jury that the law presumed *prima facie* that the receipt was in full of the price of the timber. This request was properly refused. A receipt *prima facie* imports exactly what it contains, neither more nor less. If it specifies that it is "in full," *prima facie* it is so; and if it states that it is "on account," *prima facie* more remains due, but with the right to either party to show in either case that it is erroneous. So, also, where it simply acknowledges the receipt of so much money, it imports *prima facie* that that amount was paid by the one party and received by the other, and it imports nothing more than this. The receipt in this case rightfully went to the jury for what it was worth, and the court properly refused to instruct them that the law attached any other meaning to it than that which its language conveyed.

*Affirmed.*

## P. H. TAPP ET AL. v. S. A. BONDS ET AL.

1. SHERIFF. *Execution. Failure to return. Motion. Where made.*  
Motion against a sheriff for failure to return an execution, under Code 1871, § 227, should be made and determined in the court to which the writ is returnable, although the defaulting officer resides in another county, of which he is sheriff. *Cox v. Ross*, 56 Miss. 481, cited.
2. SAME. *Return of nulla bona before return-day. Not within statute.*  
Return of the writ, indorsed no property found, within four days after its receipt, and several months before the return-day, will not support a motion under Code 1871, § 227, for failure to return on the return-day.
3. SAME. *Expiration of official term. Effect on motion.*  
The motion, under Code 1871, § 227, can be maintained against the sheriff and his sureties after his term of office has expired.

ERROR to the Circuit Court of Lee County.

Hon. J. A. GREEN, Judge.

*W. L. Clayton*, for the plaintiffs in error.

1. The proper construction of the statute is, that, if the sheriff fails to have the execution in court on the day it is returnable, the forfeiture is fixed on him and his sureties. One day after the return-day is too late. *Steen v. Briggs*, 3 S. & M. 326. Is not five months before the return-day too early? In *Beall v. Shattuck*, 53 Miss. 358, a modification of the charge that the return must be *on* the return-day, by inserting "or before," was held erroneous. The forfeiture results not from the injury to the plaintiff, but simply from the language of the law, which is "*on* the return-day."

2. The fact that Bonds was sheriff of Itawamba County, while the execution was returnable to the Circuit Court of Lee County, does not take the case out of Code 1871, § 227. Opposing counsel err in arguing that it falls under Code 1871, § 700, which does not refer to *final* process; and, if it does, the former section is not thereby abrogated.

3. Motion can be made, under Code 1871, § 227, after the officer's term has expired and he has gone out of office, otherwise the statute affords but partial remedy, for the sheriff by

vacating his office could at any time defeat a recovery, and, where his term expired before the return-day, no motion could be made. The words "sheriff" and "officer" in the section are descriptive of the person, and do not mean that the motion shall be made while he holds the office.

*J. A. Brown*, on the same side.

1. The first ground of demurrer, that the motion was in the Circuit Court of Lee County, from which the execution issued, and to which it was returnable, while Bonds was sheriff of Itawamba County where he resided, has been decided adversely to the demurrants. *Cox v. Ross*, 56 Miss. 481.

2. Bonds would not have been liable to this motion if he had complied with his duty by delivering the writ to his successor in office; but, by returning it five months too early, he released his successor and made himself liable. *Fondrin v. Planters' Bank*, 7 Humph. 447; *Richards v. Porter*, 7 Johns. 137; *Campbell v. Cobb*, 2 Sneed, 18. The statute, which reads "on the return-day," cannot be held to mean "before." *Beall v. Shattuck*, 53 Miss. 358. Had that been the intent, fit words would have been used to express it. Executions by law (Code 1871, § 839) run from one to six months, and the plaintiff has the right to that time in which to find property. Return of *nulla bona*, four days after receipt of the writ, violates both the letter and the spirit of the statute allowing the motion.

3. Escape is impossible on the ground that Bonds is out of office. His successor having been released by him, no one, in that event, would be liable. The motion lies by virtue of the statute, not because he is an officer of court. His sureties are not officers. The context shows that the word "sheriff" is *descriptio personæ*, for the beneficial and penal clauses of the statute describe him alike, and, if he ceases to be liable by losing the name "sheriff," he by the same means forfeits his rights to judgments which he has paid. The construction that because the word "sheriff" is used, the statute refers to the officer and not the man, if applied to other parts of the Code of 1871—as, for instance, §§ 2466, 2469, 2470, 2489, 2575—would demolish criminal law in the State, and would preclude remedy on the sheriff's official bond under Code 1871, § 220.



*Finley & Cayce*, for the defendants in error.

1. As Code 1871, § 227, is highly penal, and summary in its operation, it must be strictly construed and not extended. The case must be within its letter and spirit before that law can be invoked. *Banks v. Cage*, 1 How. 293; *Footte v. Vanzandt*, 34 Miss. 40; *Hill v. State Bank*, 5 Porter, 587. It is not to be presumed, in the absence of express words to that effect, that the intent of such a statute was to confine the officer to a single day to return the writ, but rather that it was to prescribe the limit for the return, beyond which it would be too late. All statutes *in pari materia* must be construed together, and a consideration of the object of the statute in connection with other parts of the same statute readily furnishes a proper construction. Code 1871, § 282. Sheriffs are not compelled to wait until the return-day, but should return executions as soon as they discover that no property can be found. Crocker on Sheriffs, 409; *Tyler v. Willis*, 33 Barb. 327; *Steen v. Briggs*, 3 S. & M. 326. Such has long been the custom, which itself affords a means of construction. 1 Kent Com. 574, note. That rule is reasonable, while the one contended for by opposing counsel would be inconvenient and oppressive.

2. Bonds being sheriff of Itawamba County, in which he resided, the motion could not prevail in the court to which the writ was returnable. Sect. 700 is the provision of the Code applicable to this case. The appropriate remedy for neglect to levy, where there is property of the defendant in execution, is by a suit against the sheriff for damages, which must be brought in the county of his residence.

3. Summary methods of enforcing penalties are allowed to courts against their officers, by reason of the official relation, and when the relation is dissolved the remedy ceases to exist. The statute provides for motions against officials only. If strictly construed, it does not embrace this case, in which the officer's term expired before the motion was made. The court will take judicial cognizance of the expiration of terms of office. *Stubbs v. State*, 53 Miss. 437. The rule of strict construction applies to penal statutes in favor of the person who is alleged to be liable, but not of the other party.

GEORGE, C. J., delivered the opinion of the court.

The plaintiffs in error made a motion in the Circuit Court of Lee County against the sheriff of Itawamba County and his sureties, under § 227 of the Code of 1871, to recover the amount of an execution in their favor, issuing from the circuit clerk's office of the first-named county, upon the ground that the said sheriff had failed to return the same on the return-day thereof. The motion showed that the execution was received by the sheriff on September 20, 1877, and was returned by him to the proper office on the twenty-fourth day of the same month, when the process was not returnable till the third Monday in February, 1878. A demurrer was interposed to the motion on several grounds: 1st, that the motion should have been made in the Circuit Court of Itawamba County, in which the sheriff resided; 2d, that the motion showed on its face that the execution was properly returned; 3d, that the sheriff's term of office had expired, and he was no longer subject to be proceeded against by motion. The court sustained the demurrer and dismissed the motion.

The first ground of demurrer is not well taken. The motion was properly made and determined in the court to which the execution was returnable, and not in the county of the residence of the defaulting officer. *Cox v. Ross*, 56 Miss. 481. It is insisted in support of the motion that the Statute (Code 1871, § 227) requires the return of the execution to be made on the very day named in it as the return-day, and that a return of it before that day is equally a violation of the law as a return made afterwards. We do not consider this a just construction of the statute. It is true the statute says, "if any sheriff, coroner, or other officer shall fail to return any execution to him directed, *on the return day thereof*," the plaintiff shall recover; but we do not consider that this means that the act of making the return shall be performed on that day and no other. The object of the statute was to secure the presence of the execution in the clerk's office from which it emanated, with the proper return of the sheriff thereon, on the day to which it was made returnable, so that the plaintiff might inspect the same, and ascertain how the sheriff had executed it. This object would be as well secured by the return and deposit

of the execution in the clerk's office before the return-day as it would be by the performance of these acts on that very day. If the sheriff has obtained the money on an execution, or has ascertained that he cannot make it or any part of it, no good purpose could be subserved by his retaining the writ. Crocker on Sheriffs, § 427 ; *Lewis v. Garrett*, 5 How. 434.

If the sheriff fails to retain the execution long enough to ascertain fully that nothing can be made out of the defendant, and, by a premature return, loses an opportunity of obtaining the money, or some part of it, whereby the plaintiff is damnified, he would be liable for such damages as were incurred by his neglect, but for nothing more. Sect. 225 of the Code makes it the duty of the sheriff to execute every writ or other process to him directed, and to make due return thereof "on the day to which the same is returnable," and imposes a fine not exceeding one hundred dollars for each failure therein. The language in this section requiring the return of process to be made on the return day thereof is just as strong as in § 227 under consideration, yet it has never been supposed that if a summons, subpoena, or writ of *venire facias* was returned before the return-day, the sheriff would be liable to the fine.

We do not think the third ground of the demurrer well taken ; to wit, that the motion cannot be maintained against the sheriff after his term of office has expired. We perceive no good reason why the motion should be allowed as to a sheriff while in office and denied as against the same person for the same default as soon as his term has expired. The object of the statute is to require prompt performance of their duties by sheriffs, and to give plaintiffs in execution ample remedy for the particular fault of not returning an execution in proper time. A large part of the efficacy of the statute would be destroyed, if its operations were cut short as soon as a sheriff went out of office. The language of the statute makes no distinction between sheriffs in office and those whose terms have expired. So far as relates to the question we are now considering, it is the same as § 229, which gives the remedy by motion against sheriffs for failing to pay over money collected on execution. In *Laughlin v. Wright*, MS., decided by the High Court of Errors and Appeals, it is conceded that a motion will

lie against a sheriff and his sureties after the expiration of his term, to compel a payment of money collected on execution, and in the case of *Livingston v. McCloy*, MS., decided by the Supreme Court, such a motion was sustained. The same conclusion has been reached in *Barton v. Peck*, 1 Stew. & Port. 486; *Buckmaster v. Drake*, 5 Gilman, 321; *Beaird v. Foreman*, 1 Scammon, 40. And in *Earl v. Smith*, 26 Texas, 522, it was held that a similar statute of that State allowed the motion, after the sheriff's term had expired, for a failure to return an execution. We see no good reason for restricting the operation of the section as contended for.

*Judgment affirmed.*

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PRESLY W. NELSON v. THE STATE.

1. JURORS. *Householder. Property qualification.*

Sect. 724, Code 1871, providing that male citizens who are householders shall be competent jurors, is not in conflict with Const., art. 1, § 13, which directs that no property qualification shall ever be required of any person to become a juror.

2. SAME. *Meaning of term "householder."*

The term "householder" in the statute refers to the civil status of the person, and not to his property, and requires that he shall occupy the position of chief in a domestic establishment, though he need be neither a husband nor a father.

ERROR to the Circuit Court of De Soto County.

Hon. SAM. POWEL, Judge.

*Shands & Johnson* for the plaintiff in error.

If the jurors were competent, the accused had a right to them on the panel, and their rejection by the court was error. *Boles v. State*, 13 S. & M. 398. The statute requiring jurors to be householders is inconsistent with that provision of the State Constitution of 1869 (Const., art. 1, § 13) which prohibits a property qualification. At common law only freeholders were competent jurymen. *Byrd v. State*, 1 How. 163. Under Code 1857, p. 497, art. 126, both freeholders and householders could serve. Code 1871, § 724, makes being a house-

holder the only prerequisite. Thus the right to serve on juries has been constantly enlarged. It is impossible to be a householder without owning property of some kind in the house. Be the lease ever so short, it is an estate for years and a chattel. 2 Black. Com. 140. A tenancy at sufferance, which is the only tenure by which one could be in possession of a house without property therein, though not a trespass, is wrongful. 1 Wash. Real Prop. 394. To support the statute, it is necessary to assume that the householders contemplated are those who are in wrongful possession, otherwise their property constitutes their qualification to serve as jurors. The legal presumption, however, is that a party in possession of a tenement holds rightfully by virtue of a contract. Starkie's Evid. 761; Broom's Legal Maxims, 907. The statute was presumably designed to qualify for jury service the mass of the best citizens of the State. Should the court sustain the constitutionality of the statute, it must proceed on the assumption that such persons are tenants at sufferance.

*T. C. Catchings*, Attorney General, for the State.

Not being householders, the jurors were properly excluded. The requirement of the statute in this respect is not violative of the Constitution, since it does not impose a property qualification. It merely designates the class of persons who shall compose the juries. A man may own large property and yet not be qualified as a juror; so he may own no property, and be qualified. The only requirement is that he must be a householder.

GEORGE, C. J., delivered the opinion of the court.

The plaintiff in error was indicted and convicted for the murder of Charles Gallagher, and sentenced to imprisonment in the State Penitentiary for life. He assigns for error in the proceedings of the court below, that the court rejected as competent jurors Dale and Perry, who, upon their examination by the court, answered that they were not householders in De Soto County. The ruling of the court is in pursuance of the provisions of § 724 of the Code of 1871; but it is now insisted that this section is in conflict with § 18 of art. 1 of the Constitution of this State, which declares that "no property

qualification shall ever be required of any person to become a juror."

If the term "householder" in the statute were interpreted to mean that it was necessary, in order to be a competent juror, that the person should be the actual tenant or occupant of a house, the statute would not be a violation of the Constitution, since a permissive occupancy as a tenant at will would fill the requirements of the statute; and such an occupancy would be in no proper sense a property qualification or right. Such a tenant has no certain and indefeasible estate, and nothing that he can assign to another. 2 Black. Com. 145.

But we do not consider that the true meaning of the term "householder." In *Bowne v. Witt*, 19 Wend. 475, the court declared that householder "means the head, master, or person who has the charge of and provides for a family, and does not apply to the subordinate members or inmates of the household." And in *Woodward v. Murray*, 18 Johns. 400, it was said, "household means a family living together, and a householder a master of a family." The same meaning was given to this term by the Supreme Court of Appeals of Virginia, in *Calhoun v. Williams*, decided in July, 1879, and reported in 21 Albany Law Journal for Jan. 31, 1880, p. 83. In *Aaron v. State*, 37 Ala. 106, it was said that "the term householder is defined by Mr. Webster to mean the master or chief of a family,—one who keeps house with his family;" that it "means something more than the mere occupant of a room or house. It implies in its term the idea of a domestic establishment,—of the management of a household." In that case the court held that a person who has merely rented a room for a year was not a competent juror under the statute of that State requiring a juror to be a householder. Our view is that the term householder in § 724 means a person who has a family, whom he keeps together and provides for, and of which he is the head or master. He need be neither a father nor a husband, but he must occupy the position towards others of head or chief in a domestic establishment. The statute refers to the civil status of the person who is to be a competent juror, and not to his property.

*Judgment affirmed.*

## R. S. STITH, ADMR., ETC. v. P. M. PARHAM ET AL.

1. JUDGMENT. *Statute of Limitations. Revivor by scire facias.*

A judgment against an administrator can be revived by *scire facias* against the administrator *de bonis non*, more than seven years after its rendition, but less than that time after the issuance of execution.

2. SAME. *Right to execution. When barred.*

The right of a judgment creditor to enforce his judgment by execution is never barred if he does not permit seven years to elapse without an effort to do so by execution.

3. SAME. *Lien. Action of debt. New judgment and lien.*

A judgment ceases to be a lien, and an action of debt thereon is barred in seven years; but by bringing such action within that time, a lien may be had after seven years.

ERROR to the Circuit Court of Marshall County.

Hon. J. W. C. WATSON, Judge.

The plaintiff in error, an administrator *de bonis non*, moved to quash a *scire facias*, issued Sept. 21, 1874, to revive a judgment in favor of the defendants in error, rendered Sept. 4, 1866, against his predecessor, upon the ground that the writ was not issued within seven years after the rendition of the judgment, and on the overruling of his motion pleaded the seven years' Statute of Limitations. The replication, a demurrer to which was overruled, averred that executions had issued Oct. 20, 1866, and Feb. 12, 1870, and that the *scire facias* was issued within less than seven years thereafter.

*E. M. Watson*, for the plaintiff in error.

Judgment against an administrator cannot be revived by *scire facias* against his successor after seven years from the date of rendition. *Scire facias* for such purpose was unknown to the common law. *Ruff v. Smith*, 31 Miss. 59; *New Orleans Railroad Co. v. Rollins*, 36 Miss. 384; *Dibble v. Norton*, 44 Miss. 158. It is of statutory origin. Hutch. Code, p. 856. No limitation was prescribed, but, as the proceeding took the place of the action of debt, the seven years' statute (Hutch. Code, p. 830, § 8) should apply. The statutory law is still the same. Code 1857, p. 400, art. 8; Code 1871, § 2153. When the lien, the action of debt, and every other remedy on the judgment are barred, the presumption is overwhelming that the legisla-

ture designed to take away the remedy by *scire facias* also. *Gaskins v. Commonwealth*, 1 Call, 194; *Phillips v. Pope*, 10 B. Mon. 163. The Statute of Limitations is intended to bar the right to a remedy, and not to cut off one specific remedy. *Goff v. Robins*, 33 Miss. 153; *Pollard v. Eckford*, 50 Miss. 681; *Banks v. Coyle*, 2 A. K. Marsh. 564; *Bilbo v. Allen*, 4 Heisk. 31; *Merritt v. Parks*, 6 Humph. 332; *Simpson v. Lassalle*, 4 McLean, 352; *State Bank v. Vance*, 9 Yerger, 471; *DeHaven v. Bartholomew*, 57 Penn. St. 126; *Prewett v. Hilliard*, 11 Humph. 423. The limitation was imposed by that clause of the statute barring the action of debt, which is brought forward in the revisions of 1857 and 1871, and for that reason *scire facias* is not named *eo nomine* in the latter statutes. This is not the common-law *scire facias*, to which the clause of the statute naming *scire facias* and construed in *Vick v. Chewning*, 31 Miss. 201, referred, but a new form of the old action of debt, which the other clause of the statute limited. A *scire facias* to revive against a party already liable is a continuation of the original suit. Herman on Executions, § 79. But this *scire facias* is a new action, because it charges a new party with a new debt, and subjects assets not already liable. *Bank of Mississippi v. Duncan*, 52 Miss. 740; *Pickett v. Pickett*, 1 How. 267; *Potter v. Titcomb*, 13 Maine, 36; *Greenway v. Dare*, 1 Hals. 305; *Palmer v. Jones*, 50 Miss. 657; *Auditor of Accounts v. Graham*, 1 Call, 475; *Humiston v. Smith*, 21 Cal. 129. If the *scire facias* is an action, it is within the narrowest construction of the statute. Again, the lien of this judgment is barred. Code 1857, p. 401, art. 15; Code 1871, § 2159. When there is no lien, a revivor cannot be had against the administrator *de bonis non*. *Fox v. Wallace*, 31 Miss. 660; *Palmer v. Jones*, 50 Miss. 657; *Partee v. Mathews*, 53 Miss. 140.

*J. H. Watson*, for the defendants in error.

When the right to revive by *scire facias* was first given, it was limited to seven years. Hutch. Code, pp. 830, 855, 856. The statute was literally construed in *Vick v. Chewning*, 31 Miss. 201. But the law-makers, appreciating the injustice of the limitation, omitted it from the Code of 1857, adopted a few months after that decision. The writ of *scire facias* to



revive against an administrator *de bonis non* is not, as contended by opposing counsel, in the nature of an action of debt. *Bowen v. Bonner*, 45 Miss. 10; *Pollard v. Eckford*, 50 Miss. 631. This court, in *Partee v. Mathews*, 53 Miss. 140, draws the distinction between *Vick v. Chewing* and the cases following it, under the Act of 1844, § 8, and the Codes of 1857 and 1871, which omit the limitation as to *scire facias*. An unbroken current of authority sustains this court in the position that a *scire facias* is not a new action, but a continuation of the old one. Freeman on Executions, § 81, notes. There is no hardship in allowing the creditor to keep alive his judgment until paid. *Bell v. Morrison*, 1 Peters, 351. The loss of the lien does not affect the right to revive, which depends on the question of execution, the right to which has no relation to the judgment lien.

CAMPBELL, J., delivered the opinion of the court.

A judgment against an administrator may be revived by *scire facias* against his successor in the administration more than seven years after the rendition of such judgment, but within "seven years from the date of the issuance of the last preceding execution on such judgment." An action of debt on a judgment must be brought within seven years next after its rendition or it will be barred, and a judgment ceases to be a lien after seven years from its rendition; but the right of the judgment creditor to enforce his judgment by execution is never barred if he does not permit seven years to elapse without an effort to do so by execution. Code §§ 2153, 2159: *Buckner v. Pipes*, 56 Miss. 366. Formerly the judgment creditor was driven to his action of debt on the judgment, and now he must resort to that, if he would have a lien after seven years, but he may have successive executions until satisfaction is obtained, if he does not remain inactive seven years. As the judgment was still alive to support an execution, and there was a new party to be charged, it was proper to have *scire facias* to obtain execution against him.

*Judgment affirmed.*

## C. H. CAMPBELL, ADMR., ETC. v. J. M. DOYLE.

1. **ESTATES OF DECEDENTS. Appeal. Cost bond. Supersedeas.**  
An executor or administrator is, under Code 1871, § 1183, relieved from giving a bond for *supersedeas*, but must, in order to appeal to the Supreme Court from a decision affecting the estate which he represents, give an appeal bond for the costs.
2. **SAME. Supersedeas. Effect of cost bond.**  
When he has given the appeal bond for costs, the executor or administrator has the right to a *supersedeas* of the execution of the judgment or decree appealed from, so far as it affects the estate.
3. **SAME. Executor and administrator. Liability for costs.**  
Under Code 1871, § 1176, judgment for costs *de bonis propriis* may be rendered against an executor or administrator, either in the Supreme or inferior court in a suit against the estate. *Williamson v. Childress*, 26 Miss. 328; *Taylor v. Webb*, 56 Miss. 631, cited.
4. **SAME. Judgment for costs. Certificate of probable cause.**  
Code 1871, § 1190, as to the court's certificate of probable cause, applies only to suits in which the executor or administrator is unsuccessful, and relieves him from personal liability only for costs recovered by the adverse party.
5. **SAME. Costs incurred by executor or administrator.**  
The executor or administrator is liable for the costs which he incurs, as, for instance, his process and witness fees, and the price of a transcript made out for his appeal, without regard to probable cause for bringing or defending the suit, or his success therein.
6. **SAME. Chancery jurisdiction. Administrator's bill to recover land.**  
If the estate has not been declared insolvent, the administrator cannot maintain a bill in equity to which the heirs are not parties, to recover land of his intestate, on the allegation that the assets are insufficient to pay the debts.

APPEAL from the Chancery Court of Montgomery County.  
Hon. R. W. WILLIAMSON, Chancellor.

*J. M. Ellis*, for the appellant.

The personal estate being insufficient to pay the debts, land must be sold, under Code 1871, § 1148; and the bill by the administrator to vest the title in himself, relieve it of clouds, and so prepare for the sale that the best price may be obtained, is proper and within the recognized jurisdiction of the Chancery Court. *Bowers v. Williams*, 34 Miss. 324. Code

1871, § 1111, provides that the administrator, so far as necessary to execute his duties, has the right to the possession of the real estate. The heir may waive his rights in the land. *Crowder v. Shackelford*, 85 Miss. 321. A declaration of insolvency is not essential. *Norcum v. Lum*, 33 Miss. 299. In *Blake v. Blake*, 53 Miss. 182, the court proceeded on the idea that the land had never belonged to the intestate. This case comes within the exceptions stated in *McCaa v. Russom*, 52 Miss. 639.

*Sweatman & Trotter*, for the appellee.

The administrator could not bring this suit before a decree of insolvency, an order for sale of the land, or a judicial ascertainment that any debts were due. *Williams v. Stratton*, 10 S. & M. 418; *Norcum v. Lum*, 33 Miss. 299; *McCaa v. Russom*, 52 Miss. 639; *Blake v. Blake*, 53 Miss. 182. As yet, the title is in the heir, and can be divested only by petition under the statute. *Hargrove v. Baskin*, 50 Miss. 194. There is no allegation that the possession of this land is necessary for the purpose of executing a will, under Code 1871, § 1111. The court clearly has no jurisdiction of the bill.

GEORGE, C. J., delivered the opinion of the court.

The bill in this case was filed by an administrator to recover land, which he alleged belonged to his intestate. His right to do so, as stated in the bill, is based upon the ground that the assets of the estate are insufficient to pay the debts; but it is not shown that the estate has been declared insolvent, nor are the heirs of the intestate made parties. The demurrer to the bill was therefore properly sustained. From this order the administrator appealed to this court without giving bond for costs, as required by the statute. Code 1871, §§ 1251, 1252.

The decisions are uniform, from a very early date, that the provisions of the statute requiring appeal bonds were conditions precedent and necessary to be performed before an appeal could be properly granted. There is no exception in the statute expressly relieving executors and administrators from the duty of giving appeal bonds. Such exemption as they have enjoyed on this subject has resulted from a statutory provision, which has existed in this State from a very early period and is

incorporated in § 1183 of the present Code, declaring that executors and administrators "shall not be chargeable beyond the amount of the assets of the testator or intestate, by reason of any mistake or omission, or false pleading." This statute has been construed to relieve them from the necessity of giving *supersedeas* bonds, when they have appealed, or sued out writs of error, because, if such bonds were required, these trustees would be made to assume a personal liability for the debts of their decedents, in contravention of the provisions of the statute above quoted. But this exception in their favor has not been carried beyond the necessity which gave rise to it, and has not, therefore, been extended so as to exempt them from the obligation to give appeal bonds, where there has been a personal liability on their part. Thus in *Wade v. American Colonization Society*, 4 S. & M. 670, the court said: "An executor is entitled to an appeal without surety where the judgment or decree is to affect only the assets of the decedents in his hands, because the appeal bond would bind him personally, and tend to render him liable beyond the assets. But when an executor is in a situation in which a personal judgment or decree can be rendered against him, and in which he may be responsible out of his own funds, then there is no more reason to allow him an appeal without surety than to allow it to any other person." And in *Hunter v. Thurmon*, 25 Miss. 463, the court said: "The rule as settled in this court relieves executors and administrators from the necessity of giving bond, as required by the general statute, only in cases where they would not be personally responsible for even the costs of the appeal;" citing *Wade v. American Colonization Society*, *ubi supra*. It is thus seen that, if an executor or administrator is liable for costs in the court below or in this court, he is not exempt from giving an appeal bond so far as to cover the costs.

In *Scott v. Searles*, 1 S. & M. 590, the High Court of Errors and Appeals decided that an executor or administrator was not liable for costs in suits prosecuted or defended by him. This decision was made under a misapprehension of the statutes on that subject, and the court in the subsequent case of *Williamson v. Childress*, 26 Miss. 328, overruled that case, and held

that the statute then existing, and re-enacted in § 1176 of the present Code, justified a judgment *de bonis propriis* against an executor or administrator for costs in the inferior courts, as well as in this court. To the same effect is *Taylor v. Webb*, 56 Miss. 631. Nor does Code 1871, § 1190, relieve them from this personal liability for costs. This section provides that, "when costs are adjudged against an executor or administrator in any suit of law or in equity, and he shall obtain the certificate of the court before which the suit was tried, that there was probable cause for bringing or defending the same, he shall not be individually liable for costs, although the estate may be insufficient to pay them." This section relieves the executor or administrator from only a part of the costs of a suit, viz., those adjudged against him, and that only on a condition which may never happen. It applies only to costs in suits in which the executor or administrator shall be unsuccessful; for it would be absurd to require a certificate of probable cause, when the judgment or decree was in his favor on the merits; and it applies also, only to so much of the costs in an unsuccessful litigation as shall be recovered against him by the adverse party. This section leaves an executor or administrator personally liable for all costs incurred by him, or expended by him,—such as service of process issued at his instance, and fees of the witnesses summoned by him, the cost of a transcript of a record required on an appeal taken or writ of error sued out by him,—whether the litigation be successful or not, and whether there was probable cause or not for prosecuting or defending the suit.

This construction is in accordance with the plain meaning of the statute, and subserves also a public policy well expressed in the following extract from the opinion of the High Court of Errors and Appeals in the case *Williamson v. Childress, ubi supra*. The court, referring to the statutes before quoted, says: "By these provisions, it was obviously the intention of the legislature, in giving the right to executors, &c., to prosecute and defend suits, to guard against the abuse of the power, and to protect the estate against the effects of improvident litigation; and certainly nothing could better promote this salutary object than the provision that executors and administrators should, in

entering into litigation, take the peril of having the expense to fall on themselves. This is a rule of justice and safety to estates which cannot work injury to faithful administrators."

We conclude, therefore, that an administrator or executor cannot appeal without giving an appeal bond for the costs. When this is done, he has a right to a *supersedeas* of the execution of the judgment or decree appealed from, so far as it affects the estate which he represents.

*Appeal dismissed.*

57	296
71	757

S. L. WEATHERSBY v. M. E. THOMA.

1. CIRCUIT COURT. *Trial by judge. Finding of facts.*

In the absence of the separate finding of the law and the facts authorized by Code 1871, § 650, it will be presumed that the judge based his general finding on the case as made by the evidence; and, if on the whole proof it appears to be correct, the judgment will be affirmed.

2. TAX TITLE. *Evidence. Auditor's deed. Conveyance to State.*

In an action of ejectment on a tax title purchased by the State for taxes in 1868, the plaintiff cannot recover on the auditor's deed, dated Oct. 24, 1870, alone, but must introduce the deed of the sheriff to the State, required by Code 1857, p. 80, art. 36, as a foundation for the auditor's right to convey.

ERROR to the Circuit Court of Pike County.

Hon. J. M. SMILEY, Judge.

*Cassedy & Stockdale*, for the plaintiff in error.

The *prima facie* case, made by the introduction of the tax title from the State to the plaintiff in error, rests on the presumption that all the proceedings resulting in that deed were legal. The assessment, when regularly made, constituted a lien on the land for the taxes thereof, which could be removed only by payment. The sale was an enforcement of the lien, and invested a complete title in the purchaser. Payment was the only defence made, and, as it was not proved, the judgment should be reversed.

No counsel for the defendant in error.

GEORGE, C. J., delivered the opinion of the court.

This was an action of ejectment, in which the plaintiff in error endeavored to recover several lots in the town of Summit upon a deed made by the auditor of public accounts on Oct. 24, 1870, conveying to him the title of the State recited in the deed to have accrued from a sale of the same to the State for taxes on July 6, 1868. The defendant undertook to show that the taxes on the lots for the alleged non-payment of which they were sold had been paid. Upon the auditor's deed, and the defendant's evidence, on which he relied to show payment of the taxes, the cause was submitted by consent of both parties, for trial on the law and the facts, to the judge, who found generally for the defendant, no request being made by either party, as authorized by the statute (Code 1871, § 650), that the judge should state his conclusions as to the law and the facts separately. Under this general finding by the judge, we are bound to sustain the judgment, if on the whole evidence it appears to be correct, and to presume that the judge decided on the case made by the evidence.

The plaintiff's case was fatally defective on account of his failure to introduce the deed to the State required by Code 1857, p. 80, art. 86, to be made by the sheriff to the State. We have held, in several cases arising under the Code of 1871, that a list of the lands sold to the State by the sheriff, in which is embraced the land sold by the auditor, is necessary to be introduced as a foundation for the auditor's right to convey. *Clymer v. Cameron*, 55 Miss. 598; *Gamble v. Witty*, 55 Miss. 26; *Vaughan v. Swayzie*, 56 Miss. 704. We see no reason why the rule should not apply to the deed to the State required under the Code of 1857. Our attention has been called to no statute dispensing with the production of this deed, and our researches have not discovered any. Under this view, it is unnecessary to pass upon the sufficiency of the defendant's evidence to show payment of the taxes for the alleged non-payment of which the lands are said to have been sold.

*Judgment affirmed.*

57	298
77	108
57	298
88	106

FLORA A. McNAIR ET AL. v. HENRY M. STANTON.

1. STATUTE OF LIMITATIONS. *Married woman. Note for land.*

A bill in equity to enforce against land a married woman's note for the purchase-money thereof is subject to the limitation applicable to that form of indebtedness, and not to the one of ten years, prescribed by Code 1871, § 2175, in relation to express trusts.

2. SAME. *Equity pleading. Demurrer.*

The defence of the Statute of Limitations can be made in equity by demurrer to the bill.

APPEAL from the Chancery Court of Lincoln County.

Hon. THOMAS Y. BERRY, Chancellor.

The appellee, on December 14, 1878, filed this bill in chancery against the appellant and her husband to enforce the payment of a note, due Nov. 1, 1869, which she gave for the purchase-money of the land sought to be subjected, and secured by a deed of trust thereon. The appellant's demurrer, setting up the Statute of Limitations of six years, was overruled.

*R. H. Thompson*, for the appellant.

The limitation applicable to this case is not that of Code 1871, § 2175, which relates to express trusts, but that of six years, provided by § 2150. The former section applies only to cases where the property is held in trust, not measured by a debt, but under such circumstances that the legal title is held subject to the beneficial ownership of another. It was never designed for a case like this, and to construe it so will be to make a married woman's obligation more oppressive than that of a man. The case of *Templeton v. Tompkins*, 45 Miss. 424, does not sustain the theory of the bill. The appellant's note or deed in trust is not void, but may be avoided at her option by surrendering the land. *Johnson v. Jones*, 51 Miss. 860. The case is, therefore, clearly within Code 1871, § 2150, and the appellee's theories must fall. The Statute of Limitations may be availed of as a defence by demurrer in equity. Story Eq. Pl. §§ 484, 503, 751; *Archer v. Jones*, 26 Miss. 583; *Nevitt v. Bacon*, 32 Miss. 212. While a plea is necessary at law, the rules in equity allow a demurrer if the



bar is apparent upon the face of the bill. *Dickson v. Miller*, 11 S. & M. 594.

*Sessions & Cassidy*, for the appellee.

The facts set forth in the bill charge the land with a trust to the extent of the unpaid purchase-money, and the limitation on the remedy to enforce it is governed by Code 1857, p. 403, art. 3, which is the same as Code 1871, § 2175. Sects. 2150 and 2151 of the latter Code relate to liabilities resulting from the contracts of parties who have legal capacity to make them, and do not refer to remedies created by courts of equity. It is not because of her contract that Mrs. McNair cannot keep the land without paying for it, but because it would be inequitable for her to do so. Because the remedy at law on the note, if any had ever existed, is barred, it does not follow that the remedy in equity to enforce the trust is barred also. *Templeton v. Tompkins*, 45 Miss. 424. The appellant's note and deed of trust do not bind her, but they serve to fix the value of the land, and equity makes her a trustee of the legal title to the land for the benefit of the vendor to the extent of the purchase-money unpaid. As it is desirable to have this question settled, discussion of the propriety of raising it by demurrer is waived.

CHALMERS, J., delivered the opinion of the court.

The note of a married woman, given for the purchase-money of land, imposes no personal obligation upon her, but she will be compelled by a court of equity to pay it or surrender the land, or so much of it as is necessary for the liquidation of the note. *Johnson v. Jones*, 51 Miss. 860. It is insisted that, inasmuch as this obligation to surrender the land is a trust raised and imposed upon her by a court of equity, it becomes barred only after the expiration of ten years, under the provisions of Code 1871, § 2175, prescribing the period of limitation in cases of trusts not cognizable in courts of law. This view is erroneous. The note of a married woman given for land is not void, or even wholly voidable. While not enforceable as a personal obligation, as indeed very few contracts of married women are, she will be compelled by a court of chancery to pay it or surrender the property acquired by its execution. This is not the

kind of trust referred to in § 2175 of the Code. Those are express trusts, springing not so much from the contracts as from the situation and duties of the parties. The trust here arises purely *ex contractu*; its amount, date of maturity, rate of interest, and period of limitation being determinable wholly by the form which the parties have given to their agreement. The vendor of the land, in receiving a bond or promissory note for the purchase-money, must be considered as limiting his right to proceed against the *feme covert* vendee for the payment of the obligation or surrender of the land to the period of limitation applicable to such forms of indebtedness. Any other doctrine would, as to the Statute of Limitations, make these contracts of a married woman more onerous than those of a person *sui juris*. Surely such was not the intention of the lawgiver.

It is competent to raise the defence of the Statute of Limitations by a demurrer to a bill in chancery, as has frequently been decided.

*Decree reversed, demurrer sustained and bill dismissed.*

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### W. H. PORTER v. THE STATE.

1. ASSAULT WITH INTENT TO MURDER. *Fire-arm. Load. Evidence.*

If an indictment for assault with intent to murder charges that the pistol was loaded with gunpowder and leaden bullets, the State must show that it was so loaded as to be capable of producing death; but the fact may be established by circumstantial evidence.

2. SAME. *Contents of fire-arm. Instructions.*

An instruction for the accused in such a case, enumerating the circumstances bearing on the question, with the statement that they are insufficient to prove the fact, is defective, unless it states all the circumstances in evidence from which it can be inferred.

APPEAL from the Circuit Court of Tallahatchie County.

Hon. SAM. POWEL, Judge.

*Fitz Gerald & Marshall*, for the appellant.

The instruction asked should have been given. The evidence being insufficient to prove the offence charged, it was competent for the court so to instruct the jury. *Perry v. Clarke*,

5 How. 495; *Frisell v. White*, 27 Miss. 198; *Garnett v. Kirkman*, 33 Miss. 389. Where the pistol is charged to have been loaded with a bullet, that fact must be proved or the defendant acquitted. *Vaughan v. State*, 3 S. & M. 553; *Hughes's Case*, 5 Car. & P. 126; 1 Arch. Crim. Pr. 888; 2 Bish. Crim. Pr. § 638. Further, the facts in evidence are insufficient to prove that the weapon was loaded as stated in the indictment.

*T. C. Catchings*, Attorney General, for the State.

It is unnecessary to produce direct evidence that the weapon was loaded as charged, but circumstances are sufficient to prove that, like any other fact. 1 Arch. Crim. Pr. 891; 1 Bish. Crim. Pr. § 498. The authorities cited for the appellant hold that the fact must be shown, but do not state the kind of evidence necessary to show it. There is nothing in the statute creating the offence which changes the rules of evidence. The instruction was also properly refused, because it did not state all the facts in evidence tending to show that the pistol was so loaded, and was calculated to mislead the jury by limiting their deliberations exclusively to the facts stated in it.

GEORGE, C. J., delivered the opinion of the court.

The plaintiff in error was indicted for an assault with intent to murder by shooting at one Bloodworth, the prosecutor, with a pistol loaded with gunpowder and leaden bullets. The evidence showed an altercation between the plaintiff in error and the prosecutor, in which, after an insulting epithet had been applied by the prosecutor to the prisoner, the latter immediately fired a pistol at the prosecutor. The shooting did not take effect on the prosecutor, nor did he hear a bullet in its passage through the air. No mark made by a bullet was found until two days afterwards, when such mark was found on a mill-house at which the shooting took place, at a point some twelve feet higher than the prosecutor. On this state of facts the court, at the request of the prisoner, charged the jury, and we think properly, that it was the duty of the prosecution to prove that the pistol was so loaded as to be capable of producing death, and, if the State failed to make this proof to their satisfaction, they must acquit. The prisoner then asked the court to charge the jury, as follows: —

“ The proof must be made that the pistol was so loaded as to be capable of producing death ; and the facts that the defendant shot the pistol, that the parties were in an angry dispute, that Bloodworth, just before the defendant fired, grossly insulted him, and that the pistol was presented in the direction of Bloodworth when the defendant fired, are not of themselves sufficient to prove the fact, but there must be evidence of the actual fact that the pistol was so loaded.”

This request was properly refused. The first part of the charge was defective in its failure to note all the circumstances shown by the evidence, from which the fact that the pistol was loaded with a leaden bullet might have been inferred. There is a total omission of all reference to the mark of a bullet on the mill-house, discovered two days after the shooting. The last clause of the charge is also improper. We do not know what is the precise idea intended to be conveyed by the phrase, “there must be evidence of the actual fact that the pistol was so loaded.” Taken in connection with the preceding part of the charge, we infer that the meaning was that there must be direct and positive evidence that the pistol was so loaded. With that construction, the giving of the charge would have been improper. There is no rule of law which prescribes a different mode of proof of the fact that the pistol was loaded with a leaden bullet, than of other facts. Proof by circumstances has been admitted in all ages of the common law. That kind of proof is frequently of the highest credibility, and warrants courts and juries in acting on its truth in the most important concerns of human life. It is frequently the only proof accessible, and to dispense with it when it is sufficient to generate a full conviction of the truth of the proposition it is offered to substantiate would be to deprive the courts of a most important and useful means of arriving at just and proper conclusions as to matters of fact to be tried before them. We consider the rule of law preferred by the request as erroneous. We also think that the circumstances proved well warranted the jury in the conclusion at which they arrived, that the pistol was loaded so as to be capable of producing death.

*Judgment affirmed.*

## G. W. TAGERT v. C. A. BAKER.

1. **THIRD NEW TRIAL.** *Order granting. Writ of error.*

The general rule that a writ of error will not lie to an order granting a new trial does not apply to such order if made after three concurring verdicts, which is prohibited by Code 1871, § 647.

2. **SAME.** *Errors of fact alone covered by the statute.*

If, without error of law in either of the three trials, the new trials are granted because of the jury's incorrect conclusions of fact, the order vacating the third verdict is void, and the successful party is entitled to judgment.

3. **SAME.** *Practice in Supreme Court. Judgment.*

The Supreme Court, if satisfied that the last new trial is unauthorized, will vacate the order and remand the case with instructions to enter judgment *nunc pro tunc* on the last verdict, but, if not so satisfied, will affirm the order and remand, with instructions to proceed to another trial.

4. **SAME.** *Presumption as to correctness of order granting.*

On the party asserting that the lower court has disregarded the statute the burden rests to show affirmatively that all the verdicts have been set aside because erroneous on the facts.

5. **NEW TRIAL.** *Order granting. Recitals.*

*Seem*, that orders granting new trials should recite whether they are made for errors of law or incorrect findings of fact.

ERROR to the Circuit Court of Jackson County.

Hon. J. S. HAMM, Judge.

The error assigned is the action of the court below in setting aside the third successive verdict for the plaintiff in error, and granting to the defendant in error a third new trial. The plaintiff in error excepted, brought up the case, and asks this court to reverse the order granting the third new trial, and to order the court below to enter judgment *nunc pro tunc* on the last verdict.

C. H. Wood, for the plaintiff in error.

Granting to a party more than two new trials is prohibited by the statute. Code 1871, § 647; *Ray v. McCary*, 26 Miss. 404; *Bowers v. Ross*, 55 Miss. 213. No error of law appears in the third trial, but the new trial was granted for mistakes of fact by the jury.

*R. Seal*, for the defendant in error.

A third new trial can be granted if the court committed errors of law during the trial, or if there is no evidence to sustain the verdict. *Ray v. McCary*, 26 Miss. 404; *Field v. Weir*, 28 Miss. 56; *Thornton v. West Feliciana Railroad Co.*, 29 Miss. 143; *Crocket v. Young*, 1 S. & M. 241. The action of the court must be presumed correct until error is made to appear. The order granting a new trial is interlocutory, not final, and no appeal or writ of error will lie. Code 1871, § 409.

CHALMERS, J., delivered the opinion of the court.

The court below set aside the third concurring verdict rendered for the plaintiff in error, and granted the defendant a fourth trial. From that order the plaintiff sued out this writ of error, and assigns as the sole ground of error the alleged usurpation of power on the part of the court in violating, as is claimed, that clause of the statute which provides that "no more than two new trials shall be granted to either party in the same cause." Code 1871, § 647. It is insisted on behalf of the defendant that the writ of error is premature, because none lies to an order granting a new trial, and that the plaintiff should have awaited the result of the fourth trial, and then, if dissatisfied, should have taken a writ of error because of that result.

Ordinarily this doctrine is correct, but an order granting a new trial after three concurring verdicts is exceptional and peculiar. If no errors of law have intervened in the progress of the several trials, and if all the new trials have been granted because of incorrect conclusions of the jury as to matters of fact, the court has no power to set aside a third verdict; and its order to that effect being a nullity, the successful party has a right to demand the rendition of a judgment in his favor. He must, therefore, if this be refused, have the right to bring the case before this court directly, and have the question tested, whether the fourth trial was awarded under circumstances which authorized it. If we should be of opinion that it was unauthorized, we would reverse and vacate the order, and remand the case with instructions to the lower court to

render a judgment *nunc pro tunc* on the last verdict found by the jury.

It has uniformly been held, however, that the statute denying to the court power to grant more than two new trials to the same party in the same case does not apply where error of law has intervened to the prejudice of the unsuccessful party, and it is therefore incumbent upon him who asserts that the court has disregarded this statute to show affirmatively that all the verdicts have been set aside because deemed erroneous upon the facts. The action of the court in granting a fourth trial has not been shown to be in excess of judicial power until it has been demonstrated that none of the preceding verdicts have been set aside because of erroneous ruling of law by the court. *Ray v. McCary*, 26 Miss. 404; *Bowers v. Ross*, 55 Miss. 213.

No such showing is made by the record in this case. It does appear that the last verdict rendered (the third one) was set aside because of erroneous findings by the jury, but there is no showing whatever as to the grounds for setting aside the first one; and, as to the second, the motion to set it aside was based both upon alleged errors of law committed by the court, and erroneous findings of fact by the jury, with nothing in the judgment sustaining it to show upon what ground it was sustained. It is manifestly impossible for us to say, under these circumstances, that the court below exceeded its power in setting aside the last verdict, and therefore its order is affirmed and the cause remanded with directions to proceed to another trial. The consideration of this case impresses us with the necessity of embodying in orders granting new trials a recital of whether the same is done because of errors of law or erroneous findings of fact.

*Affirmed and remanded.*

## R. T. CHAMBLISS v. J. E. MATTHEWS.

1. SET-OFF. *Mutuality. Notice of assignment. Debt not due.*

The maker of a promissory note, if sued by its indorsee, cannot set off the payee's note, which he purchased before the former was indorsed, unless the latter note was due when he received notice of such indorsement.

2. PROMISSORY NOTE. *Maturity. Days of grace.*

A promissory note is not due for three days after the date of payment expressed on its face.

ERROR to the Circuit Court of Tate County.

Hon. SAM. POWEL, Judge.

*C. L. McClendon and Nugent & McWillie*, for the plaintiff in error.

The maker of a promissory note, by virtue of Code 1871, § 2228, can plead any set-off "made, had, or possessed against the same previous to notice of assignment." To hold that the assignor's note cannot be so pleaded, because not due when notice was given, is to add terms to the statute. If due when pleaded, the set-off is valid. *Haughton v. Leary*, 3 Dev. & B. 21; *Mizzell v. Moore*, 7 Ired. 255; *Brazelton v. Brooks*, 2 Head, 194; *Walker v. McKay*, 2 Met. (Ky.) 294; *Houghton v. Houghton*, 37 Maine, 72; *Nettles v. Huggins*, 8 Rich. 273; *Beaver v. Beaver*, 23 Penn. St. 167; *Stewart v. Anderson*, 6 Cranch, 203; *Rose v. Hart*, 2 Smith's Lead. Cas. 309; 2 Parsons on Contracts, 742; 2 Parsons on Notes and Bills, 605; 1 Equity Lead. Cas. 143.

*Shands & Johnson*, for the defendants in error.

Mutuality is essential to set-off. The debt to be set off must have been due from the plaintiff's assignor to the defendant when the latter was notified by the plaintiff of the assignment of the debt sued on. *Bullard v. Dorsey*, 7 S. & M. 9; *Waterman on Set-off*, §§ 107, 109. A note is not mature until the expiration of the three days of grace. *Wiggle v. Thomason*, 11 S. & M. 452; *Winston v. Miller*, 12 S. & M. 550.

GEORGE, C. J., delivered the opinion of the court.

On Oct. 8, 1878, Chambliss, the plaintiff in error, made his note payable on demand to one Moss for sixty dollars.



After the note became due, to wit, on Jan. 9, 1879, Moss indorsed this note to Matthews, the defendant in error. On this last mentioned day, Moss gave his note to Tate & Co. for sixty dollars and ninety-eight cents, payable one day after date, maturing, by the allowance of the three days of grace, on Jan. 13, 1879. On the day this last note was made, viz., Jan. 9, 1879, Tate & Co. transferred it to Chambliss, the plaintiff in error, and on the next day, Matthews, the assignee of the note made by Chambliss, gave notice to Chambliss that he had purchased the note made by him to Moss. Matthews sued Chambliss on the note of the latter, which had been transferred to him, and Chambliss relied on the note made by Moss, the payee in his note, to Tate & Co. as a set-off. This suit was not brought till after both notes were due. If the note of Moss to Tate & Co. had been due and payable at the time Matthews, the assignee of the note of Chambliss, gave notice of his purchase to Chambliss, it is conceded that this note of Moss, purchased by Chambliss, would be a valid set-off in Chambliss's favor. But it is insisted here, and was so ruled in the court below, that as the set-off attempted to be used by Chambliss was not due when he purchased it, and had notice of the purchase by Matthews of Chambliss's note to Moss, the set-off cannot be allowed.

It will be noted that the attempt of Chambliss is to set off against a debt made by him to Moss, and by the latter assigned to Matthews, a note made by Moss to a third person, and which Chambliss claims to have bought before he had notice that Moss had transferred his note to Matthews; and that the debt relied on as a set-off is not the result of a dealing between Chambliss, the maker of the note, and Moss, the payee, before the former had notice of the transfer. The question here is, as to the rights Matthews acquired by his purchase of Chambliss's note. At the time Matthews purchased that note it was overdue, and at the instant of purchase, Matthews might have sued Chambliss on the note. At that time, and for four days afterwards, the note relied on by Chambliss as a set-off was not due, and if suit had been brought by Matthews at the time he purchased, or on the next day when he gave notice of his purchase to Chambliss, the latter would have been un-

able to use the note he had purchased as a set-off, because it is well settled that no debt can be made available as a set-off which is not overdue at the commencement of the suit in which it is attempted to be used. But as Matthews did not sue till after the alleged set-off became due, is he affected in his right by this delay? We think not. His rights were fixed at the time he gave notice of his purchase to Chambliss. If the latter then held no set-off, which could be used against Matthews, he could afterwards acquire none. The rights of the parties are to be determined as they existed at the time the notice was given. *McAlpin v. Wingard*, 2 Rich. 547, 550. The rule seems to be well settled that the debt pleaded as a set-off must be an existing demand *in presenti* previous to the assignment of the debt sued on. *Martin v. Kunzmuller*, 37 N. Y. 396; *Graham v. Telford*, 1 Met. (Ky.) 112; *Kershaw v. Merchants' Bank of New York*, 7 How. 386.

*Judgment affirmed.*

57	308
72	563

### THE GRANGERS' LIFE INS. CO. v. MARY W. BROWN.

1. **LIFE INSURANCE.** *Applicant's answers. Falsity. Burden of proof.*

If a suit on a life-insurance policy is defended on the ground that the deceased falsely answered in his application the question whether he had ever received a serious personal injury, the assured need not prove the answer true, though it is a warranty; but the company must show that it is false.

2. **SAME.** *Exhumation of dead body. When ordered.*

The exhumation of the body of the deceased, which is under the plaintiff's control, should be ordered in such case, if at all, only on a strong showing that, without its examination, a fraud is likely to be accomplished, which the company has exhausted every other legal means of exposing.

3. **SAME.** *Evidence. Patient's statements to physician.*

A patient's statements to his physician, as to what he has heard of a past injury to himself, are incompetent, but are admissible in evidence when they relate to his symptoms at the time they are made.

4. **SAME.** *Hearsay. Admissions after insurance.*

Statements by the applicant of facts told him, if made after the policy is issued for another's benefit, are inadmissible in evidence to contradict the written answers in his application.

5. *SAME. Interest. Lex loci solutionis. Lex fori.*

Interest on a life-insurance policy which is payable in Alabama should be calculated at eight per cent, according to the law of that State, although the suit is in a court of this State.

6. *PRACTICE. Continuance.*

It is no abuse of judicial discretion to refuse an application for continuance on the ground of the absence of material witnesses, who have never been notified to appear, and whose attendance is not stated to be expected at the next term.

ERROR to the Circuit Court of Chickasaw County.

Hon. J. A. GREEN, Judge.

After this case had been at issue for a year, and twice postponed at the company's instance, a third motion for a continuance was made on the ground of the absence of three witnesses who were stated to be material, but who had not been mentioned in the former applications. It did not appear that the witnesses had been summoned, or that any effort had been made to procure their testimony, and the affidavit failed to state that they were expected to be in attendance at the next term.

*Buchanan & Houston*, for the plaintiff in error.

1. An order should have been made for the exhumation and examination of the dead body. Power to compel the production of evidence is inherent in the court. 1 Greenl. Evid. § 309. The plaintiff is bound to produce evidence in his possession essential to justice, either on motion and affidavit of the defendant, or petition verified. 3 Starkie Evid. 1722; 1 Wharton Evid. 750. Inspection of the body would have decided the pivotal question in the suit, and exposed the attempted fraud. It was "evidently the object of senses," and should have been decided "upon view." 3 Black. Com. 332. Neither the feelings of the parties nor the sanctity of burial-places can be used as a cover for deception. Every other means of exposing the imposture had been exhausted by the company before resorting to this application.

2. After the refusal to cause the inspection of the body, it was erroneous to deny the company time to examine witnesses to prove the injury. The presence of these witnesses in court when the subpoenas for the others were ordered may have

caused the omission of their names. Their depositions may not have been taken, because their names could not be discovered until the application for continuance was made.

3. The answers of the applicant were warranties, and proof of their truth was a condition precedent to recovery on the policy. *Co-operative Association v. Leflore*, 53 Miss. 1. Such being the contract, the burden was on the defendant in error to show that the answers were true. *Price v. Phoenix Ins. Co.*, 17 Minn. 497; s. c. 3 Big. Ins. Rep. 625; *Wright v. Equitable Assurance Society*, 50 How. Pr. 367; s. c. 5 Big. Ins. Rep. 401, 405; Flanders on Ins. 208, § 4; Philips on Ins. 754; *Campbell v. New England Ins. Co.*, 98 Mass. 381, 403; *McLoon v. Commercial Ins. Co.*, 100 Mass. 472; *Sohier v. Norwich Ins. Co.*, 11 Allen, 336; *Davenport v. New England Ins. Co.*, 6 Cush. 340; *Craig v. United States Ins. Co.*, Pet. C. C. 410; *Huckman v. Fernie*, 3 M. & W. 505; *Geach v. Ingall*, 14 M. & W. 95. In the case of *Piedmont Ins. Co. v. Ewing*, 92 U. S. 377, there was no stipulation that the truth of the answers should be conditions precedent.

4. Interest should not have been calculated at eight per cent from the maturity of the policy. No rate was expressed, and there was no proof as to what interest was due by the law of Alabama, even if the recovery in our courts could be governed by the law of that State, in a matter not part of the contract.

5. Admissions of the applicant made after the policy issued were competent. Although Mrs. Brown was the beneficiary, the application was by R. C. Brown, and the statements of one joint contractor are admissible in evidence against the other who is seeking to enforce the contract. His statements to his physician as to the cause of his sickness were clearly competent. *Aveson v. Kinnaird*, 6 East, 188; s. c. 4 Big. Ins. Rep. 575. They were evidence of his state of health. *Kelsey v. Universal Ins. Co.*, 35 Conn. 225.

*W. T. Houston*, on same side, argued the case orally.

*Houston & Reynolds*, for the defendant in error.

1. The court, in refusing the continuance, did not abuse its discretion. Subpœnas had never issued for the absent witnesses, and no statement was made that they were ever ex-

pected to be in attendance. *Noe v. State*, 4 How. 380; *Weeks v. State*, 31 Miss. 490. It is not apparent that flagrant injustice was done, and, therefore, a reversal for this cause cannot take place. Exhumation of the body was also properly refused. The court had no such power. Such a proceeding is novel, unsanctioned by principle or authority, and condemned by its monstrosity.

2. It was not incumbent on the plaintiff to show the truth of the answers in the application; but the company was bound to prove them false in order to avoid discharging the sum due by the terms of their contract. *Piedmont Ins. Co. v. Ewing*, 92 U. S. 377; *Mutual Benefit Ins. Co. v. Robertson*, 59 Ill. 123; *Swick v. Home Ins. Co.*, 2 Dillon, 160.

3. The policy sued upon is payable in Mobile, Alabama, and will draw Alabama interest, which is eight per cent. Story Conflict of Laws, § 301. The court is required to take notice of the laws of the different States. Code 1871, § 805; *Swett v. Dodge*, 4 S. & M. 667; *Moore v. Davidson*, 18 Ala. 209; *Lester v. Dermotte*, 18 Ind. 246.

4. Brown's declarations as to the wound on his head made after the policy had issued for the benefit of his wife were properly excluded. *Mulliner v. Guardian Ins. Co.*, 1 Thompson & Cook, 448; *Washington Ins. Co. v. Haney*, 10 Kansas, 525; *Rawls v. American Ins. Co.*, 36 Barb. 357; s. o. 27 N. Y. 282. He could not so affect her interest. The statements to the attending physician were also incompetent. A physician may testify to statements made by a sick or injured person as to his condition and symptoms; but his testimony cannot include a recital of past events, which the patient made to him. *Ashland v. Marlborough*, 99 Mass. 47; *Chapin v. Marlborough*, 9 Gray, 244; *Emerson v. Lowell Gas Light Co.*, 6 Allen, 146; *Bacon v. Charlton*, 7 Cush. 581; *Collins v. Waters*, 54 Ill. 485; *Stewart v. Redditt*, 3 Md. 67.

*R. O. Reynolds*, on the same side, made an oral argument.

*Q. O. Eckford*, on the same side.

1. Refusing a continuance cannot generally be assigned for error. Only when flagrant injustice has manifestly been done by a capricious exercise of the judicial discretion will this court interfere. *Bohr v. Steamboat Baton Rouge*, 7 S. & M.

715; *Franks v. Wanzer*, 25 Miss. 121; *Ogle v. State*, 33 Miss. 383; *Lundy v. State*, 44 Miss. 669; *Hartford Ins. Co. v. Green*, 52 Miss. 332; *Mazey v. Strong*, 53 Miss. 280. In this case, there was no unfairness; but the insurance company was favored to the point of harming the plaintiff, and, if any real loss of evidence has happened, which is highly improbable, the company alone is to blame.

2. It is complained that the court refused, on the showing made, to violate the sanctity of a private cemetery. The proposition is revolting. To break the signet of the grave, and take from its resting-place the sacred property of relatives to gratify the corporation's mercenary curiosity, would be worse than Shylock's demand. Is it reserved for this age and this court to decide that the dead may be taken from their sepulchres, inspected, and presented in their awful silent helplessness to the public gaze? A more horrible thought can scarcely be conceived.

3. After a person's death has prevented his confronting the witness, admissions made during his lifetime should be guardedly admitted in evidence. The statements in this case were made after the insurance, and when Brown had no further interest. They cannot be received to contradict his written answers made on a more solemn and important occasion. *Mulliner v. Guardian Ins. Co.*, 1 Thompson & Cook, 448; s. c. 4 Big. Ins. Rep. 267; *Stobart v. Dryden*, 1 M. & W. 615; *Fraternals Ins. Co. v. Applegate*, 7 Ohio St. 292; *Washington Ins. Co. v. Haney*, 10 Kansas, 525; s. c. 4 Big. Ins. Rep. 69; *Swift v. Massachusetts Ins. Co.*, 2 Thompson & Cook, 302; s. c. 4 Big. Ins. Rep. 300. The case of *Kelly v. Universal Ins. Co.*, 35 Conn. 225, cited by opposing counsel, is based on *Aveson v. Kinnaird*, 6 East, 188, which *Washington Ins. Co. v. Haney*, *ubi supra*, confutes.

4. The number and variety of questions asked in every application for a policy are so great that the attempt to enforce one would be a solemn farce, if the assured was compelled to prove the truth of all the answers in order to recover. Proof must be made after the man who answered is dead, and, therefore, without his sources of information. The questions cover a lifetime. If such a rule prevailed, no one would apply for

insurance. Bliss on Life Ins. 583; *Swick v. Home Ins. Co.*, 2 Dillon, 160; s. c. 4 Big. Ins. Rep. 176; *Mutual Benefit Ins. Co. v. Robertson*, 59 Ill. 128; s. c. 4 Big. Ins. Rep. 25; *Trenton Ins. Co. v. Johnson*, 4 Zab. 576; s. c. 1 Big. Ins. Rep. 327; *Campbell v. New England Ins. Co.*, 98 Mass. 881; *Van Valkenburgh v. American Popular Ins. Co.*, 70 N. Y. 605; *Jones Manuf. Co. v. Manufacturers' Ins. Co.*, 8 Cush. 82; *Hodsdon v. Guardian Ins. Co.*, 97 Mass. 144; *Cluff v. Mutual Benefit Ins. Co.*, 13 Allen, 808. Every presumption of law is in favor of the validity of the contract. 1 Chitty on Contracts, 659; *Williams v. East India Co.*, 3 East, 192; *Merrill v. Melchior*, 80 Miss. 516. The defence of concealment is nearly allied to a charge of fraud, and the underwriters, who set it up, have the burden of proof. 2 Greenl. Evid. § 398; *American Ins. Co. v. Bryan*, 26 Wend. 563; *Popleston v. Kitchen*, 3 Wash. C. C. 138; *Columbian Ins. Co. v. Catlett*, 12 Wheat. 883.

CHALMERS, J., delivered the opinion of the court.

This is a suit brought by Mrs. Brown upon a policy of life insurance taken out by her husband in his lifetime, upon his life, for her benefit. The company defends upon the ground that the husband, in his application for the insurance, stated that he had never received any serious personal injury; whereas, in truth, he had in boyhood received a wound on the head by which his skull had been fractured, and been healed by the operation known as trephining. Upon the trial, which occurred about two years after the death of the insured, the company asked the court for an order to have the body of the deceased exhumed, with a view of ascertaining whether in fact such fracture had been sustained. The motion was based upon an affidavit stating that the defendant was advised and believed the fact to be so, but found it impossible to prove it, by reason of the fact that the boyhood of the insured had been spent, and the injury, if it occurred, had been received in Kentucky, and they found it impossible to produce any witnesses, living within the jurisdiction of the court, who could testify to the occurrence. The motion was denied, and, we think, properly.

We are not prepared to say that in a proper case the court, in the interests of justice, should not compel the exhuming

and examination of a dead body which is under the control of the plaintiff, if there is strong reason to believe that without such examination a fraud is likely to be accomplished, and the defendant has exhausted every other method known to the law of exposing it. We are prepared to say, however, that such an order should be made only upon a strong showing to that effect. It would be a proceeding repugnant to the best feelings of our nature, and likely to be in many cases so abhorrent to the sensibilities of the surviving relatives that they would prefer an abandonment of the suit to a compliance with the order. Without undertaking to define with accuracy what circumstances would justify the making of such an order, we think that a case calling for it was not shown in this instance. The suit had been pending quite eighteen months before it was brought to trial, and during that time no steps had been taken to procure any testimony tending to establish the defence set up, nor was there any competent legal testimony adduced upon the trial with this view. It is true that the physician, who attended the deceased in his last illness (which had no connection whatever with the alleged fracture of the skull), testified that the deceased told him that he had himself been told that when a child of four years of age he had met with such an accident; but it is quite evident that this could not be accepted as a basis for the desired order, since it was itself incompetent testimony. The deceased, according to this statement, knew nothing of the fact except from hearsay, and it is well settled that statements of a patient to his attending physicians are only admissible when they relate to his then present symptoms. If they consist of a narration of past events they are incompetent. *Chapin v. Marlborough*, 9 Gray, 244; *Bacon v. Charlton*, 7 Cush. 581; *Collins v. Waters*, 54 Ill. 485. The physician testified further, that when his patient made this statement to him, he examined his head and found marks of an old cicatrix, but he declined to say that it was evidence of a fracture and of trephining, and thought it equally likely to have been produced in other ways. The defendant then offered to prove by another witness that the deceased had made the same statements to him in relation to his skull having been fractured in childhood, but this testimony



was upon objection excluded, and, we think, properly. Although there is some conflict in the authorities, the decided weight of them holds that no statements of the insured, made after the issuance of the policy, are receivable in evidence to contradict the written statements contained in his application, where the policy is issued for the benefit of another. The insured in such a case is not a party to the record, has no interest in the policy, and, if he is to be considered as the agent of the beneficiary in procuring it, his agency ceases with its issuance, so that there is no legal ground upon which his statements can be received. *Mulliner v. Guardian Ins. Co.*, 1 Thompson & Cook, 448; s. c. 4 Big. Ins. Rep. 267; *Rawls v. American Ins. Co.*, 27 N. Y. 282; *Fraternal Ins. Co. v. Applegate*, 7 Ohio St. 292; *Washington Ins. Co. v. Haney*, 10 Kansas, 525.

The court properly instructed the jury that the burden of proving the falsity of the answers contained in the application rested upon the company, and that the assured was not bound to prove their truth, though they were conceded to be warranties. The answers were mostly negative responses to interrogatories, covering every conceivable subject that could be of interest to the insurance company, and seeking information as to the applicant's past suffering from, and present liability to, every disease or casualty known to man. To hold that no recovery can be had until the beneficiary has demonstrated, after the death of the insured, the truth of all these negative responses, would be virtually to declare that no recovery whatever can be obtained upon such a policy. The question is settled in accordance with this view by the Supreme Court of the United States, in *Piedmont Ins. Co. v. Ewing*, 92 U. S. 377.

The policy being payable in the city of Mobile, eight per cent interest was properly awarded upon it according to the law of Alabama.

There was no abuse of judicial discretion in refusing a continuance.

*Judgment affirmed.*

## BESSIE KIRKLAND v. THE TEXAS EXPRESS CO.

1. CHANCERY PRACTICE. *Publication for unknown parties. Affidavit.*

An affidavit to support an order of publication for unknown defendants is insufficient, if it only states that the other parties interested are unknown, and does not further aver that diligent exertions have been made, without success, to ascertain their names. Code 1871, § 1069.

2. SAME. *Clerk cannot be agent for litigants.*

A clerk of court, and especially a chancery clerk, who, in this State, exercises quasi judicial functions in many official acts, cannot act as the agent of a litigant in his court, although he receives no compensation for such agency.

3. SAME. *Partition bill. Evidence of indivisibility of land.*

In partition proceedings, although the act of Feb. 25, 1875 (Acts 1875, p. 119), dispenses with the appointing of commissioners, proof of the necessity of a sale of the land must be made by documentary evidence, or depositions taken on notice, and the *ex parte* affidavit of the complainant's solicitor is not legal proof.

4. SAME. *Sale of land. Inadequacy of price. Epidemic and quarantine.*

A sale of the land in such a case should be set aside, if made for a grossly inadequate price, when the yellow-fever prevailed at adjoining places, and, owing to a quarantine, the parties interested were prevented from being present.

APPEAL from the Chancery Court of Jackson County.

Hon. GEORGE WOOD, Chancellor.

The appellee, a company incorporated by a law of Texas, filed this bill against the appellant and persons unknown, for the sale of lands and division of the proceeds among those interested, on the allegation that it was impossible to make partition of the property without impairing its value, stating that the post-office of the appellant and the names of the other persons owning interests in the lands were unknown to the complainant. The bill, which asked for the usual order of publication, was sworn to before a justice of the peace by "A. G. Delmas, agent for the Texas Express Company." On an affidavit, verified by the same person in the same manner, which stated that the residence and address of the appellant could not be discovered after diligent inquiry, and that the other de-

defendants were unknown, A. G. Delmas, as clerk of the court, entered an order of publication, and before him the proof thereof was made. On the return-day, at rules, the clerk entered a *pro confesso* against the unknown defendants, and for the appellant, who was a non-resident minor, appointed a guardian *ad litem*, by whom she answered. The complainant's solicitor, who signed the bill, made affidavit before the clerk that he had seen and knew most of the land mentioned in the bill, and from his knowledge and belief the land, owing to its nature and condition, could not be fairly and equally divided without impairing its value; and, thereupon, the clerk entered a decree directing "A. G. Delmas, a commissioner of this court," to sell the land for cash. At the September term of court, 1878, the Chancellor confirmed the various acts of the clerk. Subsequently the commissioner reported that, on Aug. 17, 1878, he had sold the lands, when A. E. Lewis bought forty acres for five dollars, C. L. Hempstead three hundred and twenty acres for fifty dollars, and the Texas Express Company seven hundred acres for one hundred and sixty dollars, and that he had executed deeds to the purchasers. The report was confirmed, notwithstanding the appellant's exceptions, which were that the commissioner and clerk was agent of the corporation; that the affidavit and proceedings were insufficient to bring in the unknown parties; that the evidence was insufficient to sustain the decree; and that the land was sold for an inadequate price when the prevalence of the yellow-fever at adjacent points, with a strict county quarantine, prevented competition among bidders and the presence of parties interested. Affidavits were read in support of the last exception. A. G. Delmas stated that he was agent of the express company, but received no compensation.

*Stewart & Pillans*, for the appellant.

The proceedings to make the unknown parties defendants were fatally defective. *Zecharie v. Bowers*, 3 S. & M. 641. Code 1871, § 1069, must be complied with in the affidavit. *Foster v. Simmons*, 40 Miss. 585. The rule is the same under like statutes in other States. *Denning v. Corwin*, 11 Wend. 647; *Opelika v. Daniel*, 59 Ala. 211; *Earle v. McVeagh*, 91 U. S. 507. In this State, it is decided that the absence of a co-

tenant renders the decree of sale nugatory. *Vick v. Vicksburg*, 1 How. 379; *Hamilton v. Lockhart*, 41 Miss. 460; *Ingersoll v. Ingersoll*, 42 Miss. 155; *Winston v. McLendon*, 43 Miss. 254. It is elsewhere generally held that a final decree, which in a great measure decides the merits of the cause, cannot be pronounced until all the parties interested in the subject-matter are before the court. *Barney v. Baltimore*, 6 Wall. 280; *Conn v. Penn*, 5 Wheat. 424; *Shields v. Barrow*, 17 How. 180; *Hartley v. Bloodgood*, 16 Ala. 233.

2. The clerk acting judicially was disqualified to make the decree, because he was a party to the record as the express company's agent. The fact that he received no compensation does not alter the result. He conducted the case for the corporation, was the commissioner who made the sale and the judge who ordered it. No one should be a judge in his own case, and no clerk should be agent for a litigant in his own court. This rule, indisputable in principle, has been recognized in most codes and some constitutions. *Freeman on Judgments*, 145; *Cooley Const. Lim.* 411, 413; *Heydenfeldt v. Towns*, 27 Ala. 423. It is announced in this State. *Grinstead v. Buckley*, 32 Miss. 148.

8. By Const., art. 12, § 18, the land must be sold in small tracts. How then was it possible to say that it could not be divided? In fact, it was sold to several purchasers. Yet on a single *ex parte* affidavit of the complainant's solicitor, who professed to state his opinion only, the clerk decided that more than a thousand acres of land was not susceptible of division. The case was not proved. The affidavit fell far short of showing any necessity for the sale. For this, if for no other reason, the decree should be reversed.

*C. H. Wood*, for the appellee.

1. The inadequacy of price is not enough to invalidate the sale, which was properly advertised and regularly made. *Clement v. Reid*, 9 S. & M. 535. The quarantine, which was against persons coming into the county, could not prevent bidding at the sale. No foreigners are in the habit of attending sales of this character, and any one especially interested might have written or telegraphed, and employed an agent to bid for him.

2. Even if the sale is set aside, the decree must stand. The bill alleges, and the affidavit shows, that the land could not be divided. The proceedings were regular. Due notice was given. The parties interested were all made defendants to the bill, and properly brought into court, according to the provisions of Code 1871, § 1069. The appellant, however, did not ask for a rehearing or give bond under Code 1871, § 1071, but objected only to the confirmation of the sale.

3. The clerk was not incapacitated to attend to his official duties. He had no interest in the case, and received no compensation. *Grinstead v. Buckley*, 32 Miss. 148. As he could have been examined as a witness, his affidavits could not disqualify him; and his so-called agency was no more than to attend to filing the papers in the case and the like, which he was bound to do as clerk. The complainant's solicitor managed the case.

CHALMERS, J., delivered the opinion of the court.

The case abounds in errors. First: There was no sufficient affidavit to support the order of publication for the unknown defendants. The affidavit only states that the other parties in interest are unknown. The statute requires the further statement "that diligent exertions have been made without success to ascertain their names." Code 1871, § 1069. Second: The clerk of the court acted as agent of the complainant, swore to the bill, and made in his own name and on its behalf, every affidavit required in the cause. Then sitting at rules in vacation, he rendered a decree in its favor, ordering a sale of the land, and when this decree had been confirmed by the Chancellor, he acted as commissioner, made the sale, and executed deeds to the purchasers. The fact that he received no pay as agent does not affect the result. It is highly improper for any clerk to act as agent for a party litigant in his court, and doubly so for the clerk of a Chancery Court in this State upon whom are devolved by the statute *quasi* judicial functions as to many official acts. Third: There was no legal proof whatever in support of the allegations of the bill. The solicitor who prepared it, filed his own *ex parte* affidavit that he knew most of the land involved,

and that in his opinion it could not be divided in kind without impairing its value, and, upon no other showing than this, more than a thousand acres of land were ordered to be sold. The Act of Feb. 25, 1875 (Acts 1875, p. 119), dispenses with the necessity of the appointment of commissioners as provided by the Code of 1871 in this class of cases ; but it requires the court to act upon " proof," which, of course, must be made by documentary evidence or depositions taken upon notice. Fourth : The sale took place during the prevalence of the yellow-fever at adjacent places, and at a time when the entire county in which it was made was under a rigid quarantine by which all the parties in interest were effectually prevented from being present. More than a thousand acres of land were sold for two hundred and twenty-one dollars, three fourths of which was bought by the complainant for one hundred and sixty-six dollars. In view of the circumstances under which it was made and the price realized, this sale should have been set aside.

The decree of confirmation, the decree of sale, and all precedent interlocutory orders are reversed, and the cause is remanded, with leave to the complainant to proceed as he may be advised, the complainant to pay the costs in both courts.

*Decree accordingly.*

57	320
70	80

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### ORLANDO DAVIS v. F. M. BELL ET AL.

1. **CIRCUIT CLERK.** *Execution for costs. Notice to debtor. Oppression.*

A circuit clerk, who is, like other officers, a public trustee, cannot use the powers and opportunities of his position for purposes of oppression or speculation; and his right to issue process for his costs must be exercised with the utmost good faith, after notice to the debtor, if his residence can be found by reasonable diligence.

2. **SAME.** *Chancery jurisdiction. Constructive trust. Fraud.*

Such a clerk, who, after a judgment-debtor has paid his costs and promised to pay the others', procures, to strengthen a void tax-title, another officer's claim, and, without notice to the debtor, whose residence and ample personal estate he knows, issues execution, will be held, in equity, the debtor's trustee of the land on which he has it levied, and buys, through an agent, at a sacrifice.

3. SAME. *Chancery pleading. Multifariousness. Full relief. Epidemic.*

The judgment-debtor can recover in his bill touching the land, additional costs paid under protest and occasioned by the first execution, and the clerk issuing another for a balance of costs not realized at the sale, and endeavoring thereunder to sell other land in a town quarantined against yellow-fever when the debtor is a refugee from the State. *Ezelle v. Parker*, 41 Miss. 520, distinguished.

## APPEAL from the Chancery Court of Alcorn County.

Hon. L. HAUGHTON, Chancellor.

*Orlando Davis*, the appellant, *pro se*.

A circuit clerk, who, in violation of the statute (Acts 1875, p. 19), had purchased land sold May 10, 1875, for the taxes of 1874, and procured a void deed from the auditor (*Gamble v. Witty*, 55 Miss. 26) entered upon a scheme of fraud to obtain a title at execution sale. Availing of his official power to issue a writ, in which he had only the interest which he purchased from a party, who refused to permit its use, he procured the sale of the lots, without the appellant's knowledge, and became himself the purchaser through his agent. Does the bill on its face present such a case of fraud as requires an answer? Our Constitution treats an office as a trust. Const., art. 4, § 17; art. 12, § 2. It is so regarded, in adjudications, in other States and in England. *In the matter of Oaths of Attorneys*, 20 Johns. 492; *In re Dorsey*, 7 Porter, 298, 371; *Ex parte Gist*, 26 Ala. 156; *The King v. Burrell*, 5 Mod. 431. Like other trustees, the officer is responsible for the lawful use of the power and authority conferred upon him. The measure of fiduciary responsibility is the same, in the view of a court of equity, whether arising from public or private relations. *The Governor v. M'Ewen*, 5 Humph. 241, 265; *Peck v. James*, 3 Head, 75. What that measure is the courts have often decided. If he purchases the trust property with his own money, he cannot retain it, but holds as trustee. 1 Perry on Trusts, § 129. He can, under no circumstances, reap personal benefit from the manner in which he exercises his trust. 1 Story Eq. Jur. § 322. The issuance of an execution presupposes the necessity of coercing payment, and cannot be required where the debtor stands willing and ready to pay without it. *Osgood v. Brown*, Freem. Ch. 392. No one but the plaintiff

or his attorney of record can sue out and control an execution. The clerk can issue it, of his own option, only within twenty days after adjournment. Code 1871, § 837. Parol evidence may be received to establish any fact or series of facts tending to show that judicial proceedings have been abused and perverted to an improper use. *Christian v. O'Neal*, 46 Miss. 669, 672. Land cannot be levied on if sufficient personal property is found or surrendered. Code 1871, § 842. Such property cannot be found by the officer without search, nor surrendered by the debtor without notice. It was the sheriff's duty to levy on the personal property, and his levy on the land was in violation of law.

*Whitfield & Young*, for the appellees.

1. If Bell had not been clerk, the appellant would not contend that there was any element of fraud in his conduct. As a private person, he could buy the tax-title, and had the right to strengthen it by purchase at the execution sale. The fraud, then, must grow out of some fiduciary relation, supposed to result from the clerkship. His position did not prevent his purchase of the tax-title, nor does the statute (Acts 1875, p. 19) so declare. His only official act was the issuance of an execution, — which was his duty imperatively imposed by statute, and his right, as the assignee and holder of the judgment. If Bell has obtained a legal advantage of Davis, it has resulted solely from the superior diligence of the former and the latter's gross neglect. A judgment debtor must tender payment in order to avoid execution, and cannot expect to be requested to do what the judgment was obtained to enforce. Notice to the debtor that an execution is about to issue is required by no law, and, in practice, would often defeat recovery. The proceedings were regular. Bell does not stand in an odious light. It is impossible to sustain the position that he was a trustee; but public policy forbids the investigation of his motive for performing an official act.

2. The bill is also multifarious, in that to a bill to remove clouds from title is joined a demand for damages for the improper issuance of the second execution. The alleged fraudulent sale was made under the first writ; the second was for an unsatisfied balance, which, however, Davis paid before sale.



For the damages resulting from the latter writ, the remedy at law is complete and exclusive. *Ezelle v. Parker*, 41 Miss. 520. Removal of a cloud from title has no relation to the claim for damages. They are separate causes of action, springing from distinct transactions, and dependent upon different facts.

GEORGE, C. J., delivered the opinion of the court.

The appellant filed his bill in the Chancery Court of Alcorn County against the appellees, in which he charged that on January 24, 1878, a judgment for costs was rendered against the appellant in the Circuit Court of Alcorn County for eleven dollars and fifty cents; that, on May 18 of same year, he paid to the defendant, Bell, who was then the circuit clerk of said county, the jury-tax of three dollars, and the costs due said Bell, viz., two dollars and fifty cents; that there was cost due an ex-sheriff of the county, who was a non-resident, and also to an ex-circuit-clerk, Skillman; that neither of these were present to receive their costs, and that he informed the clerk, Bell, that he would pay these costs as soon as he could find the parties; that, in a few days thereafter, the said Bell went to said Skillman, to whom three dollars and fifty cents of the remaining six dollars of costs were due, and tried to prevail on him to allow an execution to be issued on said judgment for his costs, and that Skillman refused permission; and that Bell then bought Skillman's costs, and on the 28th of the same month (May, 1878), Bell issued an execution for said balance of costs, and placed the same in the hands of the sheriff of Alcorn County, and directed him to levy the same on two lots owned by the appellant in the town of Corinth, in said county; that the sheriff made the levy, and, in July following, sold the lots for five dollars each to said Bell, he making the purchase in the name of his co-defendant, Cunningham, who had no real interest in the purchase, and, in a short time thereafter, conveyed by quit-claim deed said lots to the defendant, Bell. The bill further alleged that the appellant resided in Holly Springs in this State, about sixty-three miles from Corinth; that he visited Corinth only once or twice a year; and that these facts were known to Bell. It was also charged that the appellant had five thousand dollars worth of personal property in Mar-

shall County, in this State, subject to execution ; that he knew nothing of said levy on and sale of said lots until after the sale took place ; that Bell purchased said costs of Skillman with the view of getting the right to issue the execution and have the same levied on these said two lots, and buying the same, so that he, Bell, could thereby perfect a void tax-title which he had to them ; that he had no authority from the other officers having interest in said costs to issue said execution. It is also alleged in the bill that, notwithstanding only six dollars was due as costs when the execution was issued, and the lots sold for ten dollars, the additional costs accruing by reason of the issue of said execution were such as to make the ten dollars insufficient to pay the costs ; and thereupon the defendant, Bell, issued another execution for costs, and had it levied on other lands of the appellant in Alcorn County ; that this last execution was issued during the yellow-fever epidemic of 1878, when it was known to Bell that the appellant was not in the State, being a refugee from said epidemic, and when the town of Corinth was under quarantine ; but that the appellant ascertained the fact of the levy before sale, and was compelled, owing to the quarantine, to pay seventeen dollars to stop it, and that this payment was made under protest. The prayer of the bill is to have the deed from the sheriff to Cunningham and the deed from Cunningham to Bell declared null and void, and cancelled, and also to recover from Bell all the additional costs which the complainant has been compelled to pay, and which were occasioned by an unauthorized issuance of the executions. The Chancellor sustained a demurrer to the bill, and dismissed it, and hence this appeal.

We think the bill presents a proper case for equitable relief. The appellee was a public officer, and, though he had a right to collect the costs due him, he had no right, under color of making this collection, to use the process of the court for the purpose of speculation for his own benefit or to injure the appellant. The latter had called on him, and paid his costs, and expressed an intention to pay the costs due the others as soon as he could meet them. He knew the appellant's residence and ability to pay, yet, as soon as he was paid, he sought to procure another officer to allow the execution to be

issued for his benefit, and, failing in this, he purchased his costs, and, without the slightest warning or notice to the appellant, issued another execution, and caused it to be specially levied on lots which he wished to acquire. The proceedings thus initiated were consummated in a sale to the clerk, by which he gained a great advantage by securing the lots at a nominal price. Not satisfied with this, at a time of general alarm and suspension of all business, when the appellant, with many others, was a refugee from the State, to escape a deadly epidemic, and when the town in which the sale was to be made was quarantined and all access to it prohibited, he caused another levy to be made, and endeavored to make another sale. Such a transaction cannot be tolerated. An officer's right to collect his costs by execution is a shield to protect him, not a sword to destroy or oppress the debtor. If he issues an execution, and under it purchases, either directly or indirectly, property of the defendant at a sacrifice, as was done in this case, he must be held to be a trustee for the defendant, unless he shows that he has given notice, by mail or otherwise, to the defendant, if he knows or could with reasonable diligence ascertain his residence. He should, in such a case, warn the defendant of the intended issuance of the execution, and of the threatened levy and sale, and thus give him a fair opportunity of preventing a sacrifice of his property.

The right of an officer to issue or execute process for his own benefit, and to collect costs due him, must be exercised with the utmost good faith, and with the view only of collecting his costs; it cannot be perverted to the gaining of an unfair advantage to the officer, in securing property of the defendant at a great bargain. Public officers are not allowed to use the powers or opportunities of their official position for the purpose of speculation or oppression. They are public trustees, selected for their supposed fitness to discharge public duties. Their fees and salaries are intended as a full compensation for the discharge of these duties; their right to them does not in any just sense convert their offices into private property. It would be a reproach to a constitutional government, if such officers were permitted to abuse the opportunities of official position or the powers conferred on them by law, to the enrichment of them-

selves at the expense of the public, whose servants they are, or to the detriment of any citizen.

We think, also, that so much of the appellant's bill as seeks to recover the additional costs, incurred by the wrongful issue and levy of the executions, and paid by him under protest, is maintainable. The costs grew out of the same transaction, which we have condemned on the facts stated in the bill. It is essential to full and complete relief that the court should take jurisdiction of this also. In the case of *Ezelle v. Parker*, 41 Miss. 520, the High Court of Errors and Appeals declined to give a decree for rents and possession of the land, when the bill was filed, by a complainant not in possession, to cancel a deed. We adhere to that decision. But it will be noted that in that case the complainant's remedy, as to all the matters embraced in the bill, was ample and unembarrassed at law. The deed of the wife sought to be cancelled was void for want of the joint execution of the husband, as required by statute. In such a case, the complainant, not being in possession, and therefore entitled to bring his action of ejectment, coming into equity under the statute to cancel a void deed, will be entitled to no other relief than the cancellation.

*Decree reversed, demurrer overruled, and cause remanded.*

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G. C. CHANDLER, ADMR., ETC. v. CITY OF BAY ST. LOUIS.

1. MUNICIPAL CORPORATION. *Warrants. Fraudulent alteration. Negligence.*

A municipal corporation is not liable for the increased face value of warrants drawn upon its treasury, which the clerk of its council has fraudulently raised after issuance, although the failure of its officers to draw lines through the spaces enabled the alteration to be made so skilfully as to prevent detection by purchasers in good faith.

2. SAME. *Nature and assignability. Void if unauthorized.*

City warrants, which are mere certificates of amounts due parties to whom they are issued and a means of adjusting and paying the same, though transferable under our statute, possess none of the elements of commercial paper, and impose no liability on the municipality further than they are authorized by law.

3. SAME. *Non-liability for its officers' crimes and torts.*

While municipal officers may render themselves personally liable by crimes or torts committed *colore officii*, they impose no liability on the corporation unless expressly authorized or subsequently ratified, or done in pursuance of a general authority over the subject-matter.

APPEAL from the Circuit Court of Hancock County.

Hon. J. S. HAMM, Judge.

G. C. Chandler, the appellant, *pro se*.

Any maker of a negotiable obligation for the payment of money is responsible to innocent holders for value, if by his negligence a third party raises it to a greater amount so skilfully as to excite no suspicion in the mind of a prudent person, and if there is nothing on the face of the paper or in the character of the person selling to put a purchaser on his guard. The person who commits the fraud is primarily liable, and if he is insolvent the party whose negligence contributed to the loss is responsible to the innocent holder. *Orleans v. Platt*, 99 U. S. 676; *Merchants' Bank v. State Bank*, 10 Wall. 604, 646; *Barnes v. Ontario Bank*, 19 N. Y. 152; *Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, 14 N. Y. 623; *Meade v. Merchants' Bank*, 25 N. Y. 148. The principle has been affirmed in England, and under the civil law. *Young v. Grote*, 4 Bing. 253; *Isnard v. Torres*, 10 La. An. 103; *Helwege v. Hibernia National Bank*, 28 La. An. 520. In *Espy v. Bank of Cincinnati*, 18 Wall. 604, while it is held that money paid on a raised check may be recovered back where neither party is in fault, the rule is strongly stated that if either has been guilty of negligence or carelessness by which the other has been injured, the negligent party must bear the loss. The warrants being negotiable by virtue of the statute (Code 1871, §§ 2227, 2228), the rules governing such paper apply. This suit is not to recover damages for an officer's tort, but to make good the loss of an innocent holder of negotiable paper. Municipal corporations, like natural persons, are liable for neglect of their agents. *Shearman & Redfield on Negligence*, §§ 135, 136, 137. In the exercise of private and ministerial powers, they act as individuals. 1 *Potter on Corporations*, §§ 374, 376, 382, 392. They are liable for the illegal exercise by their authorized agents of powers which

they possess. *Adsit v. Brady*, 4 Hill, 630; *Mayor of New York v. Furze*, 3 Hill, 612. The issuance of warrants on the city treasury in payment of the debts of the city, as is admitted to have been the case here, was not a governmental, public, or judicial act, but the execution of a contract, to which the rules of law applicable to natural persons apply. The city is held to the same care in guarding against injury to innocent holders of its paper, as are bank officers and private persons in issuing and putting in circulation their checks and bills of exchange; and is liable to the same extent to any one injured by the negligence of its officers.

*Benjamin Deblieux*, for the appellee.

As a municipal corporation, the defendant is not responsible for loss or damage flowing from the illegal or tortious acts of its agents, and still less for that which results from their crimes. The agents are personally liable. Every remedy against them must be exhausted before the public can be made to suffer. And it is very questionable whether the law contemplates a demand against a public corporation for damages founded on tort in any case. *Sutton v. Board of Police*, 41 Miss. 236; *Sherman v. Granada*, 51 Miss. 186. No decision of this court is cited by the appellant, and he has erred in endeavoring to apply the principles of commercial law, and the rules governing negotiable paper, to the affairs of a municipality. The tax-payers of Bay St. Louis are as innocent as the appellant, and if negligence is chargeable on either, it is on the purchaser of the warrants. On every ground the judgment should be affirmed.

CHALMERS, J., delivered the opinion of the court.

The proper authorities of the city of Bay St. Louis issued several warrants or checks on its own treasury in payment of work done for the corporation, amounting in the aggregate to nine dollars and thirty-three cents. The amounts specified in the several warrants were fraudulently raised by the clerk of the town council after issuance, until in the aggregate, as raised, they amounted to nine hundred and thirty-three dollars and thirty cents, and as thus raised they were negotiated and came in due course to the plaintiff's intestate, who, in

good faith, purchased them, supposing them to have been properly issued for the amounts apparently due upon them. It is admitted that the alterations were so skilfully effected as to prevent detection by a stranger, and that this was rendered possible by the fact that the city authorities in issuing the warrants failed to draw pen marks along or through so much of the blank spaces in the printed forms as were not used in writing the true amounts. It is insisted that these facts make the corporation liable for the full sum as now expressed upon the face of the warrants, because it was by the negligence of its officers that the fraud upon the plaintiff's intestate was rendered possible, and that it is, therefore, just that the loss should fall upon those whose officers were guilty of the neglect. There are two conclusive answers to that proposition. These warrants or checks of the city upon its own treasury, though transferable under our statute, possess none of the elements of commercial paper, and are not governed by the principles which apply to similar instruments drawn by private persons. They are intended only to serve as certificates of the amounts due to the parties in whose favor they are issued, and to furnish a convenient method of adjusting and paying the municipal indebtedness. In so far as they are authorized by law, and no further, they impose a liability upon the municipality. Whenever issued in excess of authority, they are null and void. Neither is it possible for the officers of a municipal corporation to impose any liability upon the constituent body by their crimes or torts, even when committed *colore officii*, unless expressly authorized or subsequently ratified, or done in pursuance of some general authority over the subject-matter of their action. They may by such acts make themselves personally liable, but they impose no obligations upon the public. *Sherman v. Grenada*, 51 Miss. 186.

*Judgment affirmed.*

R. B. G. BALES, ADMR., ETC. v. SOLOMON HYMAN ET AL.

**SET-OFF.** *Estates of deceased persons.*

A promissory note made by a decedent in his lifetime cannot, by virtue of Code 1871, § 602, be set off against a debt due for part of his estate purchased from his administrator. Hutch. Code, p. 854, art. 10; *Mellen v. Boarman*, 13 S. & M. 100, cited.

**ERROR** to the Circuit Court of Pike County.

Hon. J. M. SMILEY, Judge.

*Cassedy & Stockdale*, for the plaintiff in error.

Under Hutch. Code, p. 854, art. 10, which is like Code 1871, § 602, it was decided in *Mellen v. Boarman*, 13 S. & M. 100, that the intestate's debt was not a good set-off against a debt contracted with his administrator. Similar statutes, in other States, are construed in the same way: *Fry v. Evans*, 8 Wend. 530; *Hills v. Tallman*, 21 Wend. 674; *Merritt v. Seaman*, 6 Barb. 330; *Crews v. Williams*, 2 Bibb, 262; *Dayhuff v. Dayhuff*, 27 Ind. 158. Our statute is more restrictive than that of most of the other States.

*T. R. Stockdale*, on the same side, argued the case orally.

No counsel for the defendants in error.

GEORGE, C. J., delivered the opinion of the court.

The plaintiff in error, as administrator of N.G. Bales, deceased, sold to the defendants in error four bales of cotton, and, the purchasers refusing to pay for the same, this action was brought to enforce collection of the price. The defendants pleaded, as a set-off, the promissory note of the intestate, made to them and held by them at the time of his death. The plaintiff's demurrer to this plea was overruled, and he sued out this writ of error.

The demurrer should have been sustained. The statute (Code 1871, § 602) provides that "where there shall have been mutual dealings between two or more persons, and one or more of them shall die before an adjustment of such dealings, the lawful demands of such persons against each other shall be a good payment or set-off to the amount thereof, not-



withstanding the estate of one or more of such deceased persons shall be insolvent, and only the balance due shall be the debt." This statute does not embrace this case. The debt here attempted to be paid by the set-off is not a debt due to the intestate in his lifetime. It was created with the administrator since his appointment. To allow it to be paid by a debt due by the intestate in his lifetime to the debtor would be to allow a person purchasing goods from an administrator to secure a priority and preference in the collection of his debt, which might destroy the whole scheme provided by the statute for the equal distribution of a decedent's assets among his creditors. Under a statute substantially similar to this (Hutch. Code, p. 854, art. 10), a similar conclusion was reached by the High Court of Errors and Appeals, in *Mellen v. Boarman*, 13 S. & M. 100.

*Judgment reversed, demurrer sustained, and cause remanded.*

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WILLIAM DECELL v. LEWIS LEWENTHAL.

1. PRIVILEGE TAX. *Unlicensed trader. Illegal sale. Repeal of statute.*

Under the fifth section of the privilege-tax law (Acts 1875, p. 10), contracts of sale made by a merchant in his business, during the time he is unlicensed, are void, and the subsequent repeal of the statute will not make them valid. *Anding v. Levy*, ante, 51, cited.

2. SAME. *Limitation of prosecutions. Misdemeanor.*

A criminal prosecution against such merchant for exercising the privilege of conducting his business prior to January, 1877, without first paying the tax and procuring the license, is *prima facie* barred in April, 1879, by the Statute of Limitations.

3. EVIDENCE. *Exclusion. New points. Supreme Court.*

The exclusion of evidence in the lower court cannot be sustained, on appeal, upon grounds not shown by the record to have been made below, unless the excluded evidence is inadmissible under all circumstances.

4. INFANT. *Necessaries. Plantation supplies.*

The necessities for which an infant can bind himself are personal, and if he is engaged in planting on his own account, he is not bound for supplies furnished him necessary to the occupation.

57	331
75	586
57	331
79	858
57	331
91	689
31	714
57	331
e95	201
L95	209

5. **INFANT.** *Necessaries. Mixed question of law and fact.*

The court determines whether the articles fall within the class of necessities suitable to one in the infant's condition in life, and the jury, whether they are actually necessary under the circumstances of the case.

6. **SAME.** *Classification of articles. Need otherwise supplied.*

As a matter of law, tobacco, bagging, ties, and cash for cotton-picking, are not necessities; and if the infant boards with his father, who supplies him, provisions are not, for the articles must be not only of suitable kind but also actually needed.

**APPEAL** from the Circuit Court of Lincoln County.

Hon. J. B. CHRISMAN, Judge.

A. C. McNair, for the appellant.

1. Decell should have been allowed to show by the plaintiff that the latter had not paid his privilege-tax at the time the goods were sold. Acts 1875, p. 10; Acts 1878, p. 12; *Anding v. Levy*, ante, 51. It is no answer to say that the merchant could not be made to criminate himself, for a prosecution was barred at the trial. This objection is an afterthought. The evidence was excluded in the lower court solely on the ground that the contract of sale was not void, because the statute had been repealed, and a new ground cannot be relied upon here to sustain the ruling. Moreover, the party himself, and not his counsel, must make the objection as a reason for not answering. 1 Greenl. Evid. § 451. The argument, that the defendant did not prove that the sales were made in this State, is also inappropriate in this court. Had it been made below, the proof could have been introduced. The defendant had the right to use his discretion as to the order of offering his evidence.

2. The infant was not liable for the goods purchased to carry on his planting operations. Such articles do not fall within the class called necessities. Story on Sales, § 38; *Turberville v. Whitehouse*, 1 C. & P. 94; *Earle v. Peale*, 1 Salk. 386; *Darby v. Boucher*, 1 Salk. 279; 1 Roll. Abr. 729; *Tupper v. Cadwell*, 12 Met. 559; *Mason v. Wright*, 13 Met. 306; 1 Chitty on Contracts, 161; 1 Parsons on Contracts, 313. Articles must be personal to come within that class. 1 Story on Contracts, §§ 77, 79. It is not enough that they are bene-

ficial to the infant, but they must also fall within the general description of necessities. As the infant was boarding with his father, he was not chargeable for supplies. 1 Parsons on Contracts, 314; *Burghart v. Angerstein*, 6 C. & P. 690. It was also erroneous to submit to the jury the question whether the articles were within the class of necessities. That should have been determined by the court, and then the jury should have passed on their adaptation to the infant's needs. 1 Parsons on Contracts, 296; Story on Sales, § 35. The account shows that many of the articles are not necessities as matter of law, and the evidence discloses that in point of fact the infant was so fully supplied that he did not need the others.

*R. H. Thompson*, for the appellee.

1. The court below correctly sustained the objection to the effort to prove by Lewenthal himself that he had not paid the privilege-tax. (1) The witness could not be made to criminate himself. The presumption is that the Circuit Judge did his duty under Code 1871, § 778. (2) There was no effort to show that Lewenthal was a merchant of this State. (3) The law relative to the tax had been repealed before suit brought. The case of *Anding v. Levy*, referred to by the appellant, is recognized; but it is respectfully suggested that there is this limitation to the doctrine there decided: that it is only true of contracts which are immoral. If the contract is not immoral, a repeal of the prohibitory statute renders it valid. *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. 23; *Washburn v. Franklin*, 35 Barb. 599; *Curtis v. Leavitt*, 15 N. Y. 9, 85.

2. The second question presented is, when truly stated, whether an infant can defeat an action for necessities, fully made out *prima facie*, by showing that he gave or sold the goods to other people, and did not use them himself. To decide this question for the appellant would defeat the beneficial intent of the law. What tradesman would sell necessities to an infant if he was compelled to keep a sharp lookout and supervision of his customer to see that he actually, and in person, consumed every item sold? If an infant is liable at all, he is liable when he gets the goods. Can matter *ex post facto* release him from liability? If an infant buys a pair of trousers, and, after wearing them one day, disposes of them, will the

tradesman's recovery be limited to the value of their use for the one day? That the infant was boarding with his father, paying him board, does not relieve him from liability for the articles of food purchased. Here the son was emancipated, the parent was not complying with the natural obligation to maintain his child in consideration of services, and the boy, who was supporting himself, was liable for necessities. What are necessities is a mixed question of law and fact. 1 Parsons on Contracts, 296, and authorities cited; Schouler's Domestic Relations, 555. The court below, in allowing the account to be read in evidence, decided the legal feature of the question, and the jury determined the fact.

GEORGE, C. J., delivered the opinion of the court.

The defendant in error sued the plaintiff in error upon an open account for fifty-two dollars and twenty-one cents. On appeal to the Circuit Court, a judgment was rendered against the plaintiff in error for the full amount sued for. Two defences were set up to the action in the court below. (1) That the plaintiff below was a merchant, and, at the time the goods were sold, had not paid his license-tax, as required by law; (2) that the defendant below was an infant when the goods were purchased.

The goods were sold between March 31, 1876, and Jan. 6, 1877, during which time the act of March 1, 1875, entitled "An Act to regulate the tax on privileges, and to provide a uniform license system" (Acts 1875, p. 3) was in force. In *Anding v. Levy*, ante, 51, we held that, under the fifth section of that act, all contracts of sale made by a merchant in his business, during the term he was unlicensed, were void. It was further held in that case that a subsequent repeal of the statutes invalidating such contracts would not have the effect to affirm them. We see no reason to change that opinion. On the cross-examination of the plaintiff below, the defendant sought to prove by him that he had not paid his license-tax, as required by the act of 1875, before referred to. Objection was made to this evidence, not on the ground that the answers of the witness would criminate him, but on the ground that the act had been repealed. At the time of the trial, in April,

1879, a prosecution against the plaintiff for a failure to pay the tax was *prima facie* barred; and, if he intended to claim the privilege of not answering because his answers might criminate him, he should have made that specific objection, so that the defendant might have removed all objection on that score, by showing that a prosecution was barred, or by making the same proof by another witness.

It is also now urged, in support of the ruling of the court rejecting the evidence, that it was not shown that the plaintiff sold the goods to the defendant in the State, and that, for aught that appears, the plaintiff was not liable to pay the license-tax. The answer to this view is, that the objection made and sustained to the proposed evidence was that the law was repealed, and that this objection implied a concession that the plaintiff was subject to the operation of the act of 1875 when the account was made. The objection should have been specifically made, so that the very point relied on for its exclusion would have been made manifest to the court and the opposing party. Any other rule would operate most unjustly, and would have the effect to ensnare the party offering evidence. Parties making untenable objections to the introduction of evidence in the court below — as they are specifically made there — will not be allowed here to change their ground, and to have the benefit of other objections not mentioned in the court below. We know of no exception to this just and salutary rule, except where the evidence offered and excluded could not be made competent and relevant under any circumstances whatever. The court erred therefore in excluding the evidence offered.

The plaintiff below, in answer to the plea of infancy, asserted that the articles sold were necessities. He proved the sale and delivery of the articles, and that they were reasonably worth the prices charged. He also proved that the defendant, during the time he bought the goods, was farming on his own account, and was between eighteen and nineteen years of age, and that "his condition in life was as good as that of any young man in the country." He also proved that the defendant was boarding with his father and paying him board. The defendant then testified, as a witness, that he was a minor,

boarding with his father at the time he purchased the goods, and then offered to testify, further, that the articles mentioned in the account were not purchased for himself, but for laborers hired by him in the cultivation of a crop. The plaintiff's objection to this testimony was sustained. This evidence should have been admitted. The account sued on contained items of plough points and other agricultural implements, tobacco, cash, bagging and ties, bacon, flour, coffee, locks, hinges, and other items suitable for laborers on a farm. It had been shown by the plaintiff himself that the defendant was engaged in farming at the time the goods were sold. It is well settled that the necessities for which an infant may bind himself are personal, and do not extend to supplies needed or used by him in trade. Tyler on Infancy, § 76; 1 Parsons on Contracts (5th ed.), 813; *Tupper v. Cadwell*, 12 Met. 559; 1 Story on Contracts, § 127; *Grace v. Hale*, 2 Humph. 27; *Turberville v. Whitehouse*, 1 C. & P. 94. In *Grace v. Hale*, *ubi supra*, it was held that a horse was not a necessary to a minor who was engaged in farming. Infants are not considered competent to carry on business of any sort. If they are allowed to trade or farm, and to bind themselves for articles necessary in their occupations, it is not perceived that any thing remains of the protection arising from their minority.

The court erred also in leaving the whole question of necessities to the discretion of the jury. Necessaries are a mixed question of law and fact. The court determines whether the articles furnished fall within the class of necessities suitable to any one, infant or adult, in the defendant's situation and condition in life; and, if the court decides that they do come within the class, the jury are to decide whether the particular articles furnished were actually necessary under the circumstances of the case. Tyler on Infancy, § 73, and cases cited. Bibb, C. J., in *Beeler v. Young*, 1 Bibb, 519, lays down the rule thus: "Whether the articles are of those classes for which an infant shall be bound to pay is matter of law to be judged of by the court; if they fall under those general descriptions, then, whether they were actually necessary and suitable to the condition and estate of the infant, and of reasonable prices, must, regularly, be left to the jury as matter of

fact." As matter of law, the court should have decided that the tobacco, and cash for cotton-picking were not necessities, and so of the bagging and ties.

It must also be noted that the articles furnished, to come within the class of necessities, must not only be of the kind which are suitable to the infant's situation in life, but must be actually needed by him, by reason of his failure to have the requisite supplies. If the infant is already supplied, the plaintiff cannot recover. It is incumbent on the plaintiff to satisfy himself by due inquiry that the articles which he furnishes are actually suitable in quantity and quality. 1 Story on Contracts, § 129. Under the proof made by the plaintiff, that the defendant was boarding with his father, all the provisions charged in the account were shown not to be necessities. The defendant was already supplied.

*Judgment reversed, and new trial granted.*

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**JAMES M. MATTHEWS, CONTRACTOR, v. N. S. WALKER,  
SHERIFF.**

**1. CRIMINAL PROCEDURE. Punishment. County contractor.**

The contractor is entitled to the custody of a convict sentenced to a fine and costs and imprisonment in the county jail, by virtue of the statute to reduce judiciary expenses (Acts 1878, p. 164), the fourth section whereof fixes the date when the prisoner's labor begins to be applied to the fine and costs.

**2. SAME. Expenses of keeping prisoner. Costs of habeas corpus.**

The sheriff who keeps the prisoner in jail after the contractor demands him, and not the county or the prisoner, is chargeable with the jail fees, as well as the costs of a writ of *habeas corpus* sued out by the contractor to obtain custody.

**3. SAME. Duty of contractor. Prisoner's right to discharge.**

Imprisonment until the fine and costs are paid is intended for a security only, and when they are satisfied the contractor should discharge the prisoner, provided the term for which he was sentenced by the court to imprisonment, as a part of the punishment, has expired.

APPEAL from the decision of Hon. THOS. Y. BERRY, Chancellor of the Tenth District of Mississippi, denying the

appellant's application by *habeas corpus* for the custody of a convict, and remanding him to the custody of the appellee.

*J. D. Vertner*, for the appellant.

The contractor, by virtue of Acts 1878, p. 164, was entitled to the custody of the prisoner. Sect. 4 does not conflict with this construction, which is in harmony with the spirit of the law. The appellant can gain nothing but his costs by this appeal, for the term has expired. But a construction of the law is desirable for the guidance of contractors and sheriffs. The title of the act, as well as the unqualified language of sects. 1 and 2 forbids the inference that the term of the imprisonment must be served in the jail, instead of at work with the contractor. If such a construction is adopted, the judiciary expenses will not be reduced; and *all* persons convicted and committed to jail, except those sentenced for contempt and those to be imprisoned in the penitentiary, will not be delivered to the contractor.

No counsel for the appellee.

GEORGE, C. J., delivered the opinion of the court.

The appellant is the contractor for the keeping of prisoners in Claiborne County, under the provisions of an Act to reduce the judiciary expenses of the State, approved March 5, 1878 (Acts 1878, p. 164). One Daniel M'Carty was convicted in the Circuit Court of said county of a misdemeanor, and sentenced to the county jail for six months, and to pay a fine of two hundred and fifty dollars, and to stand committed till the fine and costs were paid. Immediately after the adjournment of the term of the court at which the conviction took place, the said contractor demanded the custody of M'Carty from the appellee, the sheriff of the county. This demand was refused, and thereupon the contractor sued out a writ of *habeas corpus* to recover the custody of the prisoner. The sheriff resisted the petition, upon the ground that he was entitled to the custody of the prisoner until the expiration of the six months' imprisonment, imposed as a punishment for his offence. Chancellor Berry, before whom the writ was made returnable, decided that the sheriff was entitled to the custody as claimed.



We think the Chancellor was in error. Sect. 2 of the act before referred to directs that all persons convicted and committed to the jail of the county, except those committed to the jail for a contempt of court, and those sentenced to the penitentiary, shall be delivered to the said contractor, to be kept and worked under the provisions of the act. M'Carty was convicted and committed to the jail of the county, and is not within the exceptions named, and ought therefore, under the above provision, to be delivered to the contractor, unless there is some other clause of the act which provides to the contrary. It is claimed that the contrary provision is found in sect. 4 of the act, where it is directed that "when-ever said convict shall be sentenced to jail as a part of his punishment, he shall first serve out said term, and shall then commence to work to pay said fine and costs." This language cannot have the effect contended for; since, by the second section above referred to, all persons convicted and committed to the jail of the county are to be delivered to the contractor. In other words, the contractor is substituted for the jailer in all cases of convictions and commitments to the jail of the county, with the exceptions before mentioned. The object of the language above quoted from the fourth section is meant to fix the date for the commencement of the labor of the prisoner, which is to be applied to the payment of the fine and costs, in cases where imprisonment is made a part of the punishment. This construction is also in accordance with the spirit and object of the act, which are to reduce costs and expenses. The contrary view must require the prisoner, or the county, to pay his jail fees during the time for which he was imprisoned as a punishment. It would operate hardly upon the public and the prisoner. For the guidance of the contractor, we state that the imprisonment for the costs and fine imposed by this act was intended solely to secure their payment; and whenever these are paid, the prisoner is entitled to be discharged, provided the term for which he has been imprisoned as a part of his punishment has expired.

The judgment of the Chancellor is reversed, and judgment here entered directing the sheriff of Claiborne County to deliver said M'Carty to the appellant to be by him held under the

provisions of the act before mentioned. The costs of the proceeding, both before the Chancellor and in this court, will be taxed against the appellee. The cost of keeping the prisoner in jail, after the demand for him made by Matthews, is a just charge against the sheriff, who unlawfully refused to deliver him to the contractor, and cannot be charged against either the prisoner or the county.

*So ordered.*

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FREDERICK R. PADDOCK ET AL. v. JULIA D. SHIELDS ET AL.

1. PARTITION. *Chancery jurisdiction. Unequal shares.*

The jurisdiction of the Chancery Court to make partition in cases of co-tenancy results from its original powers, and not from the statute; and partition can be made although the shares are unequal.

2. SAME. *Statutory mode. When applicable.*

The provisions of the Code of 1871 are applicable only where the shares are equal, and no circumstance exists which requires a different method in order to secure the equitable right of one interested in the property.

3. SAME. *Sale for division of proceeds. When ordered.*

The power to order a sale for partition is neither of common law nor equitable origin, but is purely statutory, and can be exercised only in the cases provided by statute. Code 1871, § 1829; Acts 1875, p. 119.

4. SAME. *Rights of co-tenants. Others' shares.*

A co-tenant has an absolute right to have his share set off, but no power to force the other joint owners to separate theirs, if they prefer to hold in common.

5. SAME. *Unequal shares. Mode of division.*

If several claim, from a common source, interests equal among themselves, but unequal as compared with other co-tenants, their interests may be set off together, and then divided among them by ballot.

6. SAME. *Allotment by ballot. When departed from.*

The statutory method of partition by ballot is to be pursued in all cases where it is applicable, but is not exclusive, and may be departed from whenever necessary.

7. SAME. *Infants. Election.*

The share of a deceased co-tenant may be set off *in solido* to his widow and his heirs, when the latter are minors, and incompetent to elect to divide their interests.

8. **SAME.** *Improvements by a co-tenant.*

A co-tenant, who has improved part of the common property, is entitled to the improved part, or, if that will injure the other co-tenants, to have compensation in money.

9. **SAME.** *Vendee of interest in a co-tenant's share.*

If practicable and consistent with the rights of the other joint-owners, partition will be so made as to protect a co-tenant's alienee of an interest only in a particular part of the common property.

10. **ENGLISH STATUTES.** *None in force here.*

None of the English statutes are in force in this State. *Sessions v. Reynolds*, 7 S. & M. 130; *Boarman v. Callett*, 13 S. & M. 149, and *Jordan v. Roach*, 32 Miss. 616 cited.

APPEAL from the Chancery Court of Adams County.

Hon. RALPH NORTH, Chancellor.

*Carson & Shields*, for the appellants.

1. The case turns upon the power of the Chancery Court to order a partition between co-tenants in any other mode than the one prescribed by the statute. As the statute, which is the governing law, particularly points out the method, no other can be valid. The question involves the scope and construction of Code 1871, ch. 26, and the amendatory act of Feb. 25, 1875 (Acts 1875, p. 119). The mode of partition adopted in this case, being different from that prescribed by the statutes, was sought to be justified in virtue of the general powers of the Chancery Court conferred by the Constitution (Const., art. 6, § 16). But as partition is not mentioned in that grant of powers, it rests between the courts of law and equity to be legislated upon like any other matter of general interest.

2. By virtue of the American statutes, following 31 & 32 Henry VIII., courts of law and equity have equal jurisdiction over the subject of partition. Co-tenants may sever their joint ownership by deed, writ of partition, or bill in equity. But the jurisdiction in chancery is limited and transferable, and subject to statutory law. 4 Kent Com. 364, 365. In this State, the subject has been often regulated and modified by statute, and the only feature which has been always preserved is the allotment by ballot, to prevent the possibility of partiality on the part of commissioners. The act of 1822 (Hutch. Code, 611) was under the Constitution of 1817, art. 5, § 6,

and Code 1857, pp. 316, 319, under the Constitution of 1832, art. 4, § 16. The Constitution of 1869, art. 6 § 16 is the same. The validity of those statutes has been sanctioned, and it has never been claimed that under the jurisdiction granted by either of the two older Constitutions partition could be made in any way except as prescribed by the statutes. Exclusive jurisdiction over the subject of partition was, for the first time, conferred on the Chancery Court by Code 1871, ch. 26, which by virtue of the eighth section of the Code, became the consolidated law, repealing all others. The allotment plan, venerable in its statutory antiquity, is the *sine qua non* of a partition in kind under that Code. The constitutional grant to the Chancery Court of "full jurisdiction in all matters in equity" no more enables the court to make partition than the grant of like jurisdiction over "roads, ferries, and bridges" empowers the board of supervisors to contract for a bridge. In either case, the grant of power must be put into effect by statute which the respective tribunals must follow, or their action is void. *Supervisors v. Arrighi*, 54 Miss. 668.

3. If, however, the decree is based on the original jurisdiction of the court, the parties in this case can get no title to their respective shares, for some of them are infants. Partition, under that jurisdiction, proceeds upon conveyances to be executed by the respective parties; and if, by reason of infancy, they are incompetent to convey, the decree can only give possession, reserving the minors' rights until they attain majority. 1 Story Eq. Jur. §§ 646, 652. The decree made is therefore void. The original jurisdiction is inadequate to this case, and the only remedy is to be found in the statutes. An allotment by ballot, under Code 1871, §§ 1823, 1824, is, in this case, impossible. Code 1871, § 1829, and Acts 1875, p. 119, provide that when a division in kind cannot be made, the land shall be sold. Before the passage of the statutes this court had pointed out a sale and division of the proceeds as the sole remedy in such cases. *Higginbottam v. Short*, 25 Miss. 160. The jurisdiction to order a sale extends to minors, and is ample for the purposes of the case at bar. *Wilson v. Duncan*, 44 Miss. 642; *Belew v. Jones*, 56 Miss. 342.

*M. Green*, for the appellees.

1. The vice of the argument for the appellants lies in the fact that this case is not covered by Code 1871, § 1809, *et seq.*, and Acts 1875, p. 119. Equity has original jurisdiction in matters of partition, independently of the statute. Hence, to show that the case is excepted from the statute is an answer to that argument. Code 1871, §§ 1809, 1811, gives to joint tenants, tenants in common, and coparceners the statutory remedy, and confers on the Chancery Court sole and exclusive jurisdiction, so as to preclude the writ of partition at law. Sect. 1815 provides that the general practice in chancery shall be the rule in partition cases; and the statute is the exception, clearly recognizing that the general jurisdiction exists and governs, except as modified. Sects. 1819, 1823, 1824, provide for a division into shares equal in value, which shall be allotted by ballot; from which it appears that the statutory method is applicable only where each person has an equal interest in the land. As that method was not intended to apply in cases where the shares are unequal, resort must be had to the original powers of the court.

2. It is fallacious to argue, that, because the land cannot be divided, a sale must be made. Sect. 1829 refers only to cases falling within the statutory proceeding, where in consequence of the nature and condition of the lands, and the number of shares into which they must be divided, it is impossible to make partition fairly and equally. But such is not the trouble here, and, in the absence of the conditions precedent, no sale can be ordered. The only effect of Acts 1875, p. 119, is to give the court power, under the conditions named, to order a sale without reference to commissioners, if the court shall be of opinion that a sale would best promote the interests of all. In partitions in chancery, the decree regulates all subsequent proceedings, and, as in this case, prescribes how the allotment shall be made. 2 Dan. Ch. Prac. 1158. The statutory method, even if applicable to this case, is merely cumulative. *Patton v. Wagner*, 19 Ark. 233; *Spitts v. Wells*, 18 Mo. 468; *Whitten v. Whitten*, 36 N. H. 326.

GEORGE, C. J., delivered the opinion of the court.

The three complainants purchased, in Sept. 1879, from one

Dyas, fifteen hundred and ninety-one and one-half twenty-five hundredths undivided interest in the Deer Park plantation, situated in Adams County. The remainder of the tract belonged to the six heirs of Wilmer Shields, subject, however, to the right of the widow of Shields to dower. The heirs of Shields are all minors. The several interests of the parties are therefore as follows: Each of the complainants is entitled to one third of fifteen hundred and ninety-one and one-half twenty-five hundredths of the land, and each of the heirs to one sixth of nine hundred and eight and one-half twenty-five hundredths of the same, subject, however, to the widow's dower. The tract of land is supposed to contain about twenty-five hundred acres. A division of the land, upon the supposition that each party got property of average value, would result in giving to the complainants each about five hundred and thirty acres, and to each heir of Shields about one hundred and fifty-one acres. The complainants filed this bill in October, 1879, for partition. In the bill they set out the inequalities of the several shares, and insist that no division can be made under the statute. They, however, ask for partition, if it can be made, and, if it cannot, they ask for a sale of the land, and a division of the proceeds. The widow answered, resisting a sale, and stating that a partition could easily be made into two parts, so as to give the complainants their interest jointly as they purchased from Dyas, and the heirs of Shields their interest also jointly. She insisted also that such a partition would be beneficial to the heirs, and a sale would be prejudicial to them. The guardian *ad litem* for the infants made the usual formal answer. The deposition of a witness was taken on behalf of the complainants, which stated, what was quite evident without proof, that the land could not be divided among the several parties interested in the mode pointed out by the statute, since the shares of the several owners were unequal. The case was set down for hearing, and the Chancellor decreed that commissioners be appointed, who should set off to the complainants *in solido* fifteen hundred and ninety-one and one-half twenty-five hundredths of the land, and the remainder to the heirs of Shields. From this decree the complainants appealed.

The complainants in their bill, and in their arguments here,

proceed on the idea that the mode pointed out in the Code of 1871, ch. 26, for the partition of estates held by co-tenants is exclusive; and that when partition cannot be made in that particular way, no partition in kind can be made at all, and the land must necessarily be sold and the proceeds divided. We do not consider this view correct. The statute provides for a partition by allotment through ballots, and manifestly this mode can be adopted only when the shares of the co-tenants are equal. If it be held that this mode is the only one that a court of equity may pursue in making partition, it would be to deny the right of partition in kind at all, except in cases where the co-tenants' shares are equal. This construction would also prevent the court from providing for well recognized rights of the several tenants in making partition. For instance, it is well settled that if one tenant has made improvements on the common property, he is entitled to compensation for them, either in money, or, as is most usually done, by causing the part improved to be set off to the improver, if it can be done without injury to the co-tenants. So it is also settled, that, when one or more of the co-tenants have aliened, so as to give the alienee an interest only in a particular part of the common property, a partition will be ordered, so as to protect the right of such alienee if practicable and consistent with the rights of the others. The statute also provides only for a partition allotting the separate share of each one of a number of co-tenants, although only one may ask for partition, and the others may prefer to hold their property in common, as, in many cases, it would be for their interest to do.

The error in the position of the complainants has its foundation in the supposition that the jurisdiction of the Chancery Court in partition proceedings rests solely upon the statute. This jurisdiction is very ancient in courts of equity, antedating the reign of Elizabeth, and is now, and has been for a long time, one of their most useful and salutary powers. 1 Story Eq. Jur. § 646, *et seq.*; Freeman on Cotenancy and Partition, § 420, *et seq.* At common law, courts of law had no jurisdiction to order partition, except among coparceners. Joint tenants and tenants in common were without remedy in this

respect. And the rule was held so strictly that partition was denied to the alienee of a coparcener against the other coparceners, though it was granted at the instance of a coparcener against the alienee. The remedy in courts of law was extended to other cases than coparceners by statute. It is settled that none of the English statutes are in force in this State. *Sessions v. Reynolds*, 7 S. & M. 130; *Boarman v. Catlett*, 13 S. & M. 149; *Jordan v. Roach*, 32 Miss. 616. The statute under consideration vests the exclusive jurisdiction in partition proceedings in the Chancery Court. If this statute is constitutional, in divesting the common-law courts of a recognized power, then, if it is also exclusive as to the mode pointed out in the statute, it would follow that no partition could be made, except when the shares are equal. And if, notwithstanding the statute, the common-law courts retain their ancient common-law power to make partition, then there would be no remedy for a partition, when the shares are unequal, except only in cases where the co-tenants were coparceners. It is not to be presumed that the legislature intended such a result. The right of a co-tenant to have his share ascertained and set apart to his separate use is said to be absolute, to be recognized and enforced by the courts under all circumstances, however inconvenient and injurious its exercise may be to the others interested. Freeman on Cotenancy and Partition, § 539.

We cannot suppose that the legislature intended to limit this right to cases where the interests of the tenants were equal, and in all other cases to compel the parties to submit to a sale in order that there might be a division of the proceeds. At common law, and by the general principles of equity jurisprudence, there was no power to make a sale for partition. The power to order a sale is purely statutory, and can only be exercised in the cases provided by statute. Sect. 1829 of the Code only authorizes a sale when from "the nature and condition of the lands, and the number" [not the inequality] "of shares into which they must be divided, it is impossible to make partition thereof fairly and equally without impairing the value of the property." This is the language of the statute. It does not provide, as contended by the appellants, that a sale shall be made in all cases where the



shares are unequal, and in all cases where the particular mode pointed out by the statute in which the proceedings shall be carried on cannot for any reason be adopted. So, if the appellant's position, that the statutory mode is exclusive, is correct, it would follow that there could be no partition except when the shares were equal, and no sale except when the shares being equal, a fair division could not be made.

But it is said the decree is erroneous in ordering a division to be made into two tracts,—one for the complainants, and one for the heirs of Shields. As to the latter, they make no complaint of the decree. They are minors, and incapable of making an election as to whether they would have partition among them of the share allotted to them jointly. They had not asked for partition either by themselves or guardian. The court found as a fact, that it would be for their interest in this proceeding to have their share set off *in solido* as against the share of the complainants. This appears also to have been a wise and proper decision for them and their mother, who had a right of dower in their interest. It would be more convenient and useful that this dower should be taken from the whole tract thus set over to the heirs, so as to be in one body. As to the complainants, if we are to regard them, as we think we must under the bill, as asking for a separation of the several interests, they have the right to have the partition, and the decree is a proper step in that direction. After their joint share shall be set apart, and the division confirmed by the court, it will be proper, on the motion of either or all of them, to appoint new commissioners to make partition of their common share among the separate owners; and when this is done, as their shares will be equal, it will be proper that the allotment shall be by ballot.

We announce, as the true rule on the matters in controversy here, that the jurisdiction of the Chancery Court to make partition, in all cases of a co-tenancy, results from its original powers, and is not derived from or dependent on the statute; that the provisions of the Code regulating the proceedings in partition are applicable only to cases where the shares of the co-tenants are equal, and where, also, no equitable circumstance exists which would require, in order to secure a right

recognized by courts of equity in any one interested in the common property, that a different mode of partition shall be adopted; that the complainants' right to have their shares set off is absolute, but that this right does not carry with it the power to force a separation of the interests of others who are willing to hold the property in common between themselves. It is also true, that, when there are several claiming under a common source, whose separate interests among themselves are equal, but unequal as compared with the other co-tenants, the court may, in making partition, have their interests set off together in the first instance, and then proceed to have a partition of this common interest among them by allotment by ballot, as required by the statute; that the statutory mode of allotment by ballot is to be pursued in all cases where it is applicable, but is not exclusive, and may be departed from whenever necessary.

*Decree affirmed and cause remanded.*

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MORRIS PAYNE v. THE STATE.

1. LARCENY. *Possession of the property. Explanation of accused.*

The explanation made by a person contemporaneously with, or when first required by the circumstances to account for, his recent possession of stolen property is admissible in evidence to rebut the presumption of guilt arising therefrom.

2. SAME. *Weight of the evidence. State's failure to disprove explanation.*

If the State fails to rebut the explanation when the means of doing so is peculiarly within its power, the jury should give it such weight as its inherent probability, with such failure, entitles it to receive.

ERROR to the Circuit Court of Adams County.

Hon. RALPH NORTH, Judge.

*M. Green*, for the plaintiff in error.

As it was incumbent on the accused to explain the character of his possession, no better evidence could have been given than his acts and language at the time. It is not contended that the declarations are competent so much on the ground of *res gestæ* as that they disprove the criminal intent.

*T. C. Catchings*, Attorney General; for the State.

The declarations made by the accused to the witnesses were properly excluded from the evidence, because they were no part of the *res gestæ*. *Scaggs v. State*, 8 S. & M. 722; 1 Wharton Crim. Law, § 699.

CHALMERS, J., delivered the opinion of the court.

The plaintiff in error was convicted of stealing a cow. He complains of the exclusion of testimony offered by him. He sold the cow to a butcher in Natchez, shortly after daylight on Saturday morning. During Saturday, the animal was missed by its owner, and search was made for it; but whether the plaintiff in error knew this is not shown. On Sunday morning, the plaintiff in error appeared in Natchez, went to the butcher, and, ascertaining that the animal had not been slaughtered, instructed that it should not be, stating that he had taken it by mistake for one of his own, and intended to notify the owner, and surrender the money. The same evening he did notify the owner, and gave him an order on the butcher for the cow, and the next morning went with him to the butcher and saw the animal surrendered. It was proved by several witnesses, among them the owner of the cow alleged to have been stolen, that the plaintiff in error himself owned a cow so strikingly similar to the one in question that it was difficult in the daytime, and impossible at night, to distinguish the two animals. All the witnesses — those for the State as well as those for the defence — testified to the previous good character of the accused.

The court below admitted evidence of the fact that the accused notified the owner of the whereabouts of the cow, and went with him to reclaim it, but excluded every thing said by him in explanation of how he came to take it, and excluded also his directions that the cow should not be slaughtered. We think this was erroneous. Recent possession of stolen property raises a presumption of guilt; but it is competent in rebuttal to give in evidence the explanations offered by the party to account for his possession, if contemporaneous with it, or offered at a time when he is first called upon by the circumstances of the case to make such explanation. It is

sometimes said that, if the explanation is reasonable, it devolves upon the State the burden of disproving it, and if the State fails to meet it, the prisoner is entitled to a verdict of acquittal. The better rule is to admit the explanation, allowing the jury to give it such weight as its inherent probability, coupled with the failure of the State to disprove it, where the means of doing so lie peculiarly within its power, may in their judgment entitle it to. *Foster v. State*, 52 Miss. 695. The explanations of the accused in this case seem to have been given as soon as, or perhaps before, he heard of the search for the missing cow. They should have been submitted to the jury, to be given such weight as they chose to attach to them.

*Reversed and new trial awarded.*

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#### A. O. COX ET AL. v. WEED SEWING MACHINE Co.

##### 1. BOND OF IDEMNITY. *Sureties. Notice of acceptance and default.*

The sureties on a bond conditioned to answer for the debts and defaults of a sewing-machine agent, who is the principal obligor, and to whom the bond is delivered, are neither guarantors nor sureties on a guaranty, and are not entitled to notice of the obligee's acceptance of the bond, or the agent's subsequently contracted debts.

##### 2. SAME. *Ultra vires. Plea. Certainty.*

In an action by the corporation, which is the obligee in such bond, to recover the principal obligor's note and his debt of one dollar, a plea by the sureties that the plaintiff had no power to make the contract sued on, if allowable at all, must state which contract is meant, and wherein it is beyond the corporate powers.

##### 3. SAME. *Breach. Principal's voluntary note.*

Such note, made after execution of the bond, if without consideration, cannot be collected from the sureties in that suit.

##### 4. SAME. *Notice to obligee. Warning.*

The mailing, before any machines are delivered, of notice to the plaintiff not to let the agent have them, is no defence to such action.

##### 5. PLEADING. *Demurrer. Assignment of Causes.*

A plea which answers the cause of action, except one dollar, should be sustained against a demurrer thereto which does not assign for cause that it professes to answer the whole action while it covers only a part.

ERROR to the Circuit Court of Lincoln County.

Hon. J. B. CHRISMAN, Judge.

*H. Cassedy*, for the plaintiffs in error.

The law applicable to this case, on the subject of notice, while uncertain in other States, is clearly settled by our own court. A line of demarcation between contracts of guaranty where notice is required and those where it is not is, in this State, distinctly drawn, and based on the reason for notice as applicable to the contract in each case. Where the contract binds the guarantor for the debt of another to a definite amount, with a fixed day for its payment, it is primary, and no notice is required of his obligations and duties. *Thrasher v. Ely*, 2 S. & M. 139; *Mathews v. Chrisman*, 12 S. & M. 595; *Baker v. Kelly*, 41 Miss. 696. But where, by the contract, a party assumes to pay a debt or debts of another, to be contracted on his credit in the future, without any amount being stated, or any definite time fixed for the maturity of such debt, it is reasonable that, before such an indefinite liability becomes fixed, the guarantor should have notice that his security has been accepted; that the debt has matured, and the debtor has made default. He should have notice that he may watch the increase of his liability, and take indemnity from the debtor, as well as provide for its payment. *Hill v. Calvin*, 4 How. 231; *Williams v. Staton*, 5 S. & M. 347; *Montgomery v. Kellogg*, 43 Miss. 486. It is an abuse of terms to say that Cox and Deason were primarily bound as sureties, and not as guarantors. Gibson was not absolutely bound for any debt at the date of the bond; and the sureties could not incur a liability greater than that of their principal. Until accepted and credit extended, the bond was without consideration, and, until the sureties were so notified, was a mere escrow. The condition provides that it is to be a "continuing guaranty," to be terminated on notice. This provision and the wide scope of the instrument show the importance of notice of its acceptance.

*R. H. Thompson*, on the same side.

A guarantor is entitled to notice of the acceptance of the guaranty before liability attaches. *Montgomery v. Kellogg*, 43 Miss. 486; *Thrasher v. Ely*, 2 S. & M. 139; *Hill v. Calvin*, 4 How. 231; *Williams v. Staton*, 5 S. & M. 347. The

foregoing authorities also show that the guarantor is entitled to notice of the extension of credit to the principal debtor. The contract sued on is a contract of guaranty under the distinction between suretyship and guaranty laid down in Bouvier's Law Dic. title Suretyship. The fact that Gibson signed the bond does not change the nature of the obligation. He may be a principal guarantor of his own debt, and Cox and Deason may be sureties to him in this contract. Gibson has the physical power to sign a contract guarantying his own debt, and there is nothing immoral or illegal in so doing. The terms of the contract must determine whether it is a contract of guaranty or suretyship; and this question is not determinable by the fact whether or not it is signed by the principal. The case of *McMillan v. Bull's Head Bank*, 32 Ind. 11, differs from the case at bar, — (1) An amount was agreed upon there: here, none; (2) The credit there was given at the time, and no other engagement of the principal was contemplated: here another engagement is expressly provided for. The bond sued on defines itself as a continuing guaranty. It is collateral to Gibson's contract of indebtedness, was given two days before Gibson owed the company a cent, and imposes a secondary liability. It is an undertaking that Gibson shall pay. Guaranty is an undertaking that the debtor shall pay; suretyship that the debt shall be paid. 2 Parsons on Contracts, ch. vii.

The plea of no consideration was clearly good, and the demurrer thereto should have been overruled. No form of action can obscure the fact that the note is the real basis of the suit. The plea of *ultra vires* is a good plea, when interposed by the corporation. Green's Brice's *Ultra Vires*, 608. This is necessary, unless we ignore all legislative intent and place all corporations on the same footing. Reason, logic and justice revolt at the idea of one rule for the corporation and another for the other contracting party. So long as we observe forms of action, no suit based on a contract can be maintained when the contract itself is void. A party gaining an advantage over a corporation through a contract which is *ultra vires* should be made to respond in a proper proceeding, but not in a suit based on a nullity.

*Sessions & Cassedy*, for the defendant in error.

1. The undertaking sued on was absolute in its terms and definite in amount; and notice of acceptance or of Gibson's default was unnecessary to make Cox and Deason liable. Where notice is held to be requisite, the undertaking is not of that character, but is in the nature of a proposal to guarantee. *Montgomery v. Kellogg*, 43 Miss. 486; *Whitney v. Groot*, 24 Wend. 82; *Smith v. Dann*, 6 Hill, 543; *McMillan v. Bull's Head Bank*, 32 Ind. 11. That is the distinctive quality of all the cases referred to by opposing counsel, in which it is decided that notice is essential.

2. The judgment is right upon the whole record, independently of the correctness of the decisions on the demurrers to the pleas. The pleas are such as cannot be joined, either at common law or by statute, unless by leave of court. Code 1871, § 597; 1 Chitty Pl. 560. The final judgment was proper, therefore, on the ground of misjoinder. No motion for a new trial appears, and no complaint of the verdict or judgment was made, so that the defendant in error is entitled to an affirmance whether the pleas were good or bad.

GEORGE, C. J., delivered the opinion of the court.

W. P. Gibson, A. O. Cox, and J. B. Deason, on Nov. 13, 1876, executed their joint and several bond to the defendant in error in the penalty of one thousand dollars, with a condition as follows: "That if the above bounden W. P. Gibson, his heirs, &c., shall well and truly pay, or cause to be paid, any and every indebtedness or liability now existing, or which may hereafter in any manner exist, or be incurred on the part of the said W. P. Gibson to the said Weed Sewing Machine Company, whether such indebtedness or liability shall exist in the form of book accounts, notes, renewals or extensions of notes or accounts, acceptances, indorsements, guaranties, assignments, or otherwise (hereby waiving presentment for payment, notice of non-payment, protest and notice of protest, and diligence upon all notes now or hereafter executed, endorsed, transferred, guaranteed, or assigned by the said W. P. Gibson to the said Weed Sewing Machine Company), then this obligation to be void; but otherwise to remain

in full force and effect. This to be a continuing guaranty by each of the above parties until after notice in writing shall have been given to, and actually received by, the said Weed Sewing Machine Company from each." The declaration assigned as a breach of the condition of the bond, that, on Nov. 15, 1876 (two days after the date of the bond), the said Gibson became, and was, indebted to the plaintiff in the sum of four hundred and fifty-five dollars, and on said day executed to the plaintiff his promissory note for the same, payable at the end of four months from that time; and, as a further breach, it was averred that on said Nov. 15, 1876, the said Gibson became indebted to the plaintiff in the sum of one dollar, for sewing-machine oil then sold by the plaintiff to him. It was averred further that neither said Gibson nor the other defendants have paid said debts; by reason whereof the defendants became liable to pay the same.

The defendants Cox and Deason pleaded separately,—  
1. *Non damnificatus*; 2. That the said bond was delivered by them to the said Gibson, and not to the plaintiff, and that they had no notice of the acceptance of said bond by the plaintiff until long after the maturity of the note mentioned in the declaration; 3. That they had no notice of the indebtedness of Gibson mentioned in the declaration until long after it fell due; 4. A plea setting out the facts pleaded in the second and third pleas. The plaintiff demurred to the second, third, and fourth pleas, and replied to the first, and the demurrer was sustained. The defendants Cox and Deason, under leave, filed several other pleas, and among them the following: 2. The mailing of notice to the plaintiff not to let Gibson have any machines, and this before any machines were delivered; 3. That the note of Gibson mentioned in the declaration is without any consideration whatever; 4. That the plaintiff had no power to make the contract sued on. The plaintiff's demurrer to these pleas was also sustained. A verdict was rendered against the defendants on the issues made by the other pleas, for the amount of the note and interest. Cox and Deason, sued out this writ of error, and assign that the lower court erred in sustaining the demurrers to the pleas and refusing to extend them back to the declaration.



It is here insisted that the instrument sued on was a guaranty, and that notice of its acceptance by the plaintiff, and of the credit given under it, should have been given to the sureties, Cox and Deason. We do not consider the instrument sued on a guaranty, in the sense in which it has been held that a guarantor is entitled to notice of its acceptance and of the credit given under it. A guaranty has been defined to be a collateral engagement to answer for the debt, default or miscarriage of another person. De Colyar on Guaranty, 1. Brandt, in his excellent work on Suretyship and Guaranty, § 1, says: "A surety or guarantor is one who becomes responsible for the debt, default, or miscarriage of another person. The words 'surety' and 'guarantor' are often used indiscriminately as synonymous terms; but while a surety and a guarantor have this in common, that they are both bound for another person, yet there are points of difference between them which should be carefully noted." And, proceeding to point out this difference, the same author says: "A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning. . . . On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join." Tested by these rules, the defendants, Cox and Deason, would not be guarantors. They are joint obligors with Gibson, and not separate contractors. Their contract and liability are exactly the same as Gibson's. They bound themselves to do exactly what Gibson bound himself to do, neither more nor less. No breach of the bond can occur as to Gibson which is not equally a breach as to them, and what is a good performance as to Gibson is equally good as to them. Their promise is joint and several with Gibson's, — original as his is, and not collateral to it in any sense whatever. Their counsel admit that, as to this bond, they are the sureties of Gibson, and not guarantors.

But it is further insisted that they are sureties on this bond; that the instrument itself is a guaranty; and that they are therefore but sureties on a guaranty, and are entitled to all the privileges allowed by law to guarantors. The argument is plausible and ingenious, but unsound. If they are sureties in

an instrument of guaranty, Gibson is the principal, which would make Gibson the guarantor of his own debt, which would be absurd; for it is of the essence of a guaranty that the guarantor should become responsible for the debt, default, or miscarriage of another. Since, therefore, the principal obligor in the bond cannot be a guarantor, the instrument cannot be a guaranty; and the defendants, Cox and Deason, must be sureties merely, and not guarantors. Their true relation is that of sureties to Gibson in the contract sued on; that is, they have undertaken, with Gibson, to perform that contract for his benefit. Their obligation, it is true, is to be responsible for the debt, default, or miscarriage of Gibson; not, however, by a collateral and separate agreement, but in the same instrument, and only so far as that debt is created in that instrument, or the default or miscarriage may be occasioned by a non-compliance by Gibson with its terms. In testing their liability under it, we are first to ascertain the liability of Gibson under the same instrument. When that is fixed, their liability is also fixed. It being impossible for Gibson to be a guarantor for himself, he is not entitled to notice of the acceptance of the bond by the obligee, or of any subsequent advances under it. If the fact that the bond is a security for the debt, miscarriage, or default of Gibson makes it a guaranty, then every official bond of a public officer, every attachment and replevin bond, and every injunction bond and appeal bond would be guaranties; for they are all undertakings for the debt, default or miscarriage of the principal obligor. The Supreme Court of Indiana reached a similar conclusion, respecting a bond substantially the same as the one in controversy, in the case of *McMillan v. Bull's Head Bank*, 32 Ind. 11.

We think the demurrer to the third plea of the defendants pleaded on *respondeat ouster* ought not to have been sustained. The plea contained a good answer to the entire action, except one dollar, and the plaintiff did not assign as cause of demurrer that the plea professed to answer the whole action, while in truth it only answered a part. If the note, the non-payment of which is assigned as a breach of the bond, was without consideration, no recovery could be had on that account. The demurrer to this plea is ordered to be overruled. The de-

murrer to the second plea filed under judgment of *respondeat ouster* was properly sustained. As to the plea of *ultra vires*, it is only necessary to say now, that, if allowable at all, — about which we express no opinion, — the demurrer was properly sustained to it, because it failed to name which one of those contracts mentioned in the declaration was without the power of the corporation, and because, also, the plea fails to state wherein and in what respect the contract was *ultra vires*.

*Judgment reversed and cause remanded.*

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EX PARTE H. L. PHILLIPS.

1. HABEAS CORPUS. *Convict. Void sentence.*

Notwithstanding Code 1871, § 1397, which declares that the writ of *habeas corpus* shall not apply to a person imprisoned under lawful judgment, a convict in the penitentiary is entitled to be discharged on that proceeding if the record of his trial is so fatally defective as to render the sentence a nullity.

2. CRIMINAL PROCEDURE. *Statutes of Jeofails. Constitutional law.*

The statutes (Code 1857, p. 573, art. 7; Code 1871, § 2884; Acts 1878, p. 200) which provide that no verdict in a criminal case shall be annulled for any error or omission occurring before sentence, unless the record shows that objection was made in the lower court, are constitutional.

3. SAME. *Defects cured by statutes. Collateral attack.*

In the absence of such objection, a sentence is valid in a collateral proceeding, by virtue of those statutes, although the record fails to show an order for summoning a grand jury, or their organization, impaneling, or swearing, or the appointment of a foreman, or the finding or filing of the indictment, or the prisoner's presence.

4. SAME. *Objections. How reserved. Motion in arrest.*

A recital in such record that the defendant's motion in arrest of judgment was heard and overruled, or a *pro forma* motion in arrest, is not a sufficient objection, under the statutes, to reserve the defects for a collateral attack, but the motion must specify the errors or omissions. *Semble*, that the same is true on error or appeal.

5. SAME. *Practice in Circuit Court unaffected by the statutes.*

The observance of every statutory and common-law rule for the protection of the accused is as essential now as before the statutes were passed.

6. CRIMINAL PROCEDURE. *Effect of the statutes. Presumption of regularity.*

The effect of the statutes is simply to shift the presumption as to the subjects embraced by their language, to which, when the record is silent, the courts are now required to apply the maxim, *Omnia præsumuntur rite esse acta*.

7. SAME. *Reserving objections. Burden on accused.*

Under the statutes the duty of attacking, in the lower court, the errors and omissions complained of is devolved upon the accused, who, in order to show in this court that he did so attack them, must see that the record properly embodies and sets forth his motions or objections.

APPEAL from a decision of Hon. J. A. GREEN, Judge of the First District of Mississippi, dismissing a writ of *habeas corpus* and remanding the relator to custody.

*Inge & Chandler*, for the appellant.

1. The writ of *habeas corpus* may be employed in all cases of illegal confinement. Code 1871, § 1396; *Donnell v. State*, 48 Miss. 661. If the judgment were simply voidable, the remedy would be by writ of error to reverse it; but if void, the writ of *habeas corpus* can be properly employed. *Hurd on Habeas Corpus*, 326, 328; *Tidd's Prac.* 398; *Ex parte Gibson*, 31 Cal. 619, 625. The question is whether the court had any right to try the defendant under the circumstances. *In re Blair*, 4 Wis. 522; *Ex parte Burnett*, 30 Ala. 461. The record of the Circuit Court must show affirmatively that a grand jury was organized, and the indictment properly returned into court. *Laura v. State*, 26 Miss. 174; *Cachute v. State*, 50 Miss. 165. A grand jury not elected, summoned, and impanelled according to law, is an illegal body, and cannot return a valid indictment. *McQuillen v. State*, 8 S. & M. 557; *Stokes v. State*, 24 Miss. 621. The record of the Circuit Court must stand or fall by itself, and is not aided by recitals in the indictment, or any subsequent pleading; nor can facts necessary to be in the record be supplied by presumption. *Nichols v. State*, 46 Miss. 284; *Gaiter v. State*, 45 Miss. 441; *Smith v. State*, 28 Miss. 728; *Carpenter v. State*, 4 How. 163; *Abram v. State*, 25 Miss. 589; *Foster v. State*, 31 Miss. 421. It is not sufficient that the Circuit Court has general criminal jurisdiction, to render its judgments only voidable: it must have jurisdiction of the particular case it assumes to try. It has no jurisdiction to try a felony without the previous lawful finding

and return into court of an indictment by a lawful grand jury. Const., art. 1, § 31. These are jurisdictional facts which can be shown only by the record, and cannot be supplied by presumption. As they are not shown by this record, the subsequent judgment is void.

2. If the statutes, Code 1871, § 729, and statutes similar to that of Feb. 12, 1878, have the effect to authorize the Circuit Court to dispense with a record of its proceedings, or justify trials for felonies without previous indictment, they are repugnant to the Constitution and void. This court has not so construed them. In *Newcomb v. State*, 37 Miss. 383, the true rule for construing statutes in aid of incompetent officers is laid down. Under a statute requiring all objections to form or substance to be made before verdict, the court held that this meant only such errors as the defendant could waive expressly or by silence; that he could not waive an objection which went to the essence of the offence. The return of an indictment before trial is a constitutional necessity, which the defendant can waive neither expressly nor by silence. It is a jurisdictional fact which can only be shown by the record, and cannot be supplied by presumption; and, if no entry of the return of the indictment is required when so returned, an entry is necessary at some stage of the case; and, if not, the filing by the clerk is a matter of absolute necessity, and it is no filing without his official signature. *Cornwell v. State*, 53 Miss. 385. As to the construction of the various jury laws that have been in force from time to time, see *Box v. State*, 34 Miss. 614; *Miller v. State*, 33 Miss. 356; *Portis v. State*, 23 Miss. 578; *Stokes v. State*, *ubi supra*. The record does not show that the defendant was confronted with the witnesses against him, nor does it show the return into court of the verdict in his presence. No privy verdict can be returned in felony cases. 1 Chitty Crim. Law, 643; Hawkins P. C. b. 2, ch. 47, § 9; 2 Hale P. C. 299; and Co. Lit. 227. On such a record a debt of ten dollars could not be collected. It is held that a judgment which does not specify the amount is void. *Claughton v. Black*, 24 Miss. 185. Nor can the costs be collected in such a case. *Easterling v. State*, 35 Miss. 210. Will it be contended that a grand jury in blank can deprive a citizen of his liberty for ten years,

while a judgment in blank cannot deprive him of a few dollars? If this record can stand, the Circuit Court is no longer a court of record; and the constitutional provision which prohibits the trial of the citizen for felony except upon indictment is a nullity. The question of jurisdiction may be raised at any time, at any stage of the case, and in any court, and the want of jurisdiction can always be shown collaterally. *Stockett v. Nicholson*, Walker, 75; *Yalobusha Co. v. Carbry*, 3 S. & M. 529; *Buckingham v. Bailey*, 4 S. & M. 538; *Green v. Creighton*, 10 S. & M. 159; *Bell v. Tombigbee Railroad Co.*, 4 S. & M. 549; *Peters v. Finney*, 12 S. & M. 449; *Lester v. Harris*, 41 Miss. 668.

*T. C. Catchings*, Attorney General, for the State.

1. The only mode by which the appellant can avail himself of the defects in the proceedings in the Circuit Court is by writ of error. This was the rule, aside from any statutory regulation. It is settled beyond question, by Code 1871, § 1397, which prohibits the discharge on *habeas corpus* of any person suffering imprisonment under lawful judgment. The Circuit Court is a court of record having jurisdiction over criminal cases. It has jurisdiction to try and to punish the appellant for the offence with which he was charged. Among the least questionable of its powers and duties are the deciding whether a grand jury was properly organized; whether it had in due form found and presented an indictment, which was properly filed; and whether the prisoner was confronted with the witnesses against him. In short, the court had jurisdiction to decide whether any and all things necessary in the arrest, trial, conviction, and punishment of the accused had been done in the manner and at the time required by law; and its decision on any or all of these questions is conclusive in a collateral proceeding. In *Ex parte Watkins*, 3 Peters, 193, the objection made was that the indictment charged no offence. In *Ex parte Winston*, 9 Nev. 71, the conviction was under a statute which it was claimed had been repealed. In *Platt v. Harrison*, 6 Iowa, 79, the relator averred that the city had no power to pass the ordinance under which he was convicted. But in each of those cases, as well as in *Ex parte Shaw*, 7 Ohio St. 81, it is held that, if a person is imprisoned by virtue

of the judgment of a court possessing general jurisdiction in criminal cases, the judgment cannot be re-examined on *habeas corpus*. To the same effect are the cases of *Johnson v. United States*, 3 McLean, 89; *Ex parte McGehan*, 22 Ohio St. 442; *Ex parte Van Hagan*, 25 Ohio St. 426. The proceeding by *habeas corpus* was not intended as a substitute for a writ of error. It does not reach errors and irregularities; but the inquiry is limited to the question whether the judgment is void for illegality. An irregularity is a departure from a rule or mode of procedure. Tidd's Prac. 434; 3 Chitty Prac. 509. Illegality is predicable of radical defects only, and denotes a complete defect in the proceedings. Tidd's Prac. 435. It would be irregular to sentence a man to imprisonment in his absence, occasioned by the court; but it is illegal to imprison him for an offence punishable only by a fine. *Ex parte Gibson*, 31 Cal. 619, 624. It has, accordingly, been held that the writ does not reach the case of a prisoner who was not allowed to cross-examine the witnesses; or of one tried by a jury improperly summoned; or of one under a sentence which departs from the statute. *Stewart's Case*, 1 Abb. Pr. 210; *Ex parte Tracy*, 25 Vt. 98; *State v. Shattuck*, 45 N. H. 205. The prisoner's absence, at a time when he had the right to be present, does not entitle him to a discharge on *habeas corpus*. *People v. Ruloff*, 5 Parker Cr. (N. Y.) 77. Nor does the fact that the prisoner is erroneously sentenced before the statutory interval of six hours has elapsed after his plea of guilty, entitle him to be so released. *Ex parte Smith*, 2 Nev. 338.

2. Even on writ of error, however, the defects in this record cannot be availed of. No objection was made at all in the Circuit Court; and, therefore, under the act of 1878 (Acts 1878, p. 200), none can be heard. The failure of the record to show the impanelling of the grand jury, the return of the indictment, or the prisoner's presence, is cured by that statute, as are also all "errors or omissions occurring before sentence." The record does not show that the prisoner was not confronted by the witnesses against him, but is merely silent on that point. The clerk's failure to sign the indorsement of the filing of the indictment is also cured by failure to object in the Circuit Court.

CHALMERS, J., delivered the opinion of the court.

The relator, who was tried and convicted in the Circuit Court of Alcorn County of the crime of manslaughter, and sentenced to ten years' imprisonment in the penitentiary, brings this writ of *habeas corpus*, demanding to be discharged and set at liberty upon the ground that the record of his trial, as the same remains on file in said court, is so defective in its failure to show essential jurisdictional facts as to be a nullity. If this proposition is correct, he is entitled to be released under this proceeding, notwithstanding that clause of the statute (Code 1871, § 1397) which declares that the proceeding by *habeas corpus* shall not be held to authorize the discharge of any person "suffering imprisonment under lawful judgment," because the lawfulness of the judgment is the test of the efficacy of the writ, and the judgment itself must be tested by the record of the court which assumed to pronounce it. If it is true, therefore, that the record of the relator's conviction is fatally defective by reason of its failure to show the occurrence of judicial or ministerial acts, so essential in their character that such failure, under the Constitution and laws of this State, makes the record a nullity, the relator is undoubtedly entitled to be discharged. A transcript of that record is before us, and we must say that we never saw a worse one, or one which reflected less credit upon those who are responsible for its preparation. It opens with a proper caption, stating the meeting and organization of the court at the time and place appointed by law. Then follows a recital that "the sheriff returned into court a writ of *venire facias* issued by the chancery clerk in the words and figures following, to wit." Then follows the writ commanding the sheriff to summon twenty persons, naming them, to serve as grand jurors. There is no statement by the clerk or any thing in the writ itself to show that it was issued in obedience to any order of the board of supervisors, nor is there any allusion to the board of supervisors in this record. Then follows a statement that all the persons named in the writ appeared and answered to their names. Then follows an attempt to state that the grand jury was impanelled and sworn; but the entry is imperfect, breaking off abruptly in



the middle of an uncompleted sentence, and containing several blank spaces. Then the names of the foreman and of the members of the jury, and of the officer sworn to take charge of them, are all left blank. Then, without preface or recital, the indictment is given with the indorsements upon it. It is not here stated how, when, or by whom, it was brought into court, and though marked "filed," the indorsement to that effect is not signed by the clerk. Upon a later page of the record, where the arraignment of the prisoner is set out, it is stated that the indictment had been "presented against him in open court by the foreman of said grand jury, and said indictment marked filed by the clerk of the court." There is no express statement that the prisoner was personally present at any stage of the trial except the arraignment, though it does appear that he made motions for a new trial and in arrest of judgment, but upon what grounds, and whether in person or by counsel, is not shown.

Are these defects so fatal in their character as to make the record a nullity? Is there an omission to state the occurrence of facts so essentially important that the omission must be held to have deprived the court of jurisdiction, or, rather, can we say that because of the silence of the record on the subject we must presume that the omitted facts did not occur?

Undoubtedly such would have been the ruling of our predecessors under the statutes, as they existed previous to the Codes of 1857 and 1871. But those Codes wrought a vast change in the rules of interpreting in this court records of the inferior courts in criminal cases, and this difference of interpretation has been made still broader by the Acts of 1878, pp. 199, 200, 201. By Code 1857, art. 7, p. 573, and by Code 1871, § 2884, it is declared that no verdict shall be "arrested, reversed, or annulled, after the same is rendered, for any defect or omission in any jury, either grand or petit, or for other defect, either of form or substance, which might have been taken advantage of before verdict, and which shall not have been so taken advantage of." By the Acts of 1878, p. 200, 201, it is provided that no verdict shall be "reversed or annulled in the Supreme Court because the transcript of the record in said court fails to show a proper organization of the grand jury, or

fails to show that the prisoner was present in court during the trial, or during any portion thereof, nor for any errors or omissions occurring before sentence, which might have been taken advantage of in the court below, and which shall not have been so taken advantage of, unless said transcript shows that these errors and omissions were taken advantage of by motion or otherwise in the lower court; and when said motions are made in the lower court, it shall always be competent for the court to amend any improper entries, or supply any omissions, so as to make the record conform to the facts as they occurred."

If these several statutory provisions are constitutional, they fairly embrace every defect found in the record before us. That record shows no order for the summoning of a grand jury by the board of supervisors, no proper organization, impanelling, or swearing of the grand jury, no appointment of a foreman, no proper bringing in of an indictment by the foreman of the grand jury in the presence of twelve of his fellows, no signature by the clerk of the filing of the indictment, and no presence of the prisoner during some of the most important steps taken at the trial. But no objections whatever were made to any of these things during the progress of the trial, nor after its conclusion, unless it was by the motion in arrest of judgment. That motion is not set out in the transcript, nor have we any information that it was made, except from a recital in these words, — "Came on to be heard the motion of defendant in this cause in arrest of the judgment rendered herein, which motion is by the court overruled." Assuming the constitutionality of the statute of 1878, which devolves upon the defendant the duty of attacking in the lower court the errors and omissions complained of, it is plainly incumbent on him to show in this court that he did so attack them, and hence it is his duty to see that the record properly embodies and sets out the motions or objections urged by him in the lower court with that view. His motion is not before us, and consequently we cannot say what was its scope and point of attack.

We incline to the opinion that, even upon writ of error, it would not be sufficient for him to show that he made in general terms a motion in arrest, without any specification what-

ever of the defects complained of. We shall certainly so rule in this collateral attack upon the record. The statute declares that when the defendant, by motion or otherwise in the lower court, complains of the errors and omissions existing in the record, the court shall have power to correct defects and supply omissions so as to make it conform to the facts as they actually occurred. The policy thus indicated will be defeated if the defendant by a mere *pro forma* motion in arrest, without any specification whatever of the grievances complained of, can obtain all the advantage in this court of the irregularities in the record below. The consequence of such a ruling would be that, in every case, these formal motions would be made, which, while not giving the lower court notice of the point of the motion, would practically nullify the power confided to it of reforming the record, so as to make it show the facts as they actually occurred.

We see no error or omission in the record before us that is not covered by the existing statutes, nor do we see any valid constitutional objections to the statutes themselves. It is no less essential now than always that a party charged with a felony should be indicted by a grand jury, and that the indictment shall be brought into court and the trial be conducted according to all the forms prescribed by law. A neglect upon the part of the Circuit Court to observe any statutory enactment or common-law principle intended for the protection of the accused, where the same has not by the lawgiver been declared to be directory only, will vitiate a verdict, or, if it relates to a jurisdictional fact, will render the proceedings void. The only change wrought by the statutes under consideration is in shifting the legal presumptions as to the matters covered by their language. To such matters, when the record is silent, the courts are now required to apply the maxim *Omnia præsumuntur rite esse acta*. Nor does it seem to us that there is any thing of hardship or injustice in this requirement. It should not be presumed in the first place that the Circuit Court will permit accused persons to be tried in violation of law, or will fail to extend to them the benefit of every safeguard to which they are legally entitled. Still less should it be presumed that they themselves are so ignorant or

so friendless as to submit to trial without demanding and receiving the protection of those safeguards. If such has been the case, it will surely occur to them or their counsel or their friends to have the matter brought to the attention of the court at some time during the term, and, by motion or otherwise, have the wrong corrected, or at least a memorial made of it, so that it may be reviewed and reversed by the appellate tribunal. In the case at bar, for instance, we cannot suppose as a matter of fact that the relator was tried upon an indictment that was never brought into court, which had been framed by a body of men which assumed to act as a grand jury without having been elected, impanelled, sworn, or charged, which had no foreman to preside over its deliberations, and no officer to attend; or that the accused was absent during the whole progress of the trial, except at the arraignment. The record shows that he was defended throughout by able and experienced counsel, who would not for a moment have submitted to such a proceeding, even if the court would have permitted it; or if, as a stroke of policy, the counsel had passed it over in silence during the trial, they certainly would have taken advantage of it after conviction. It is evident, we think, that, in truth, all the requirements of law were complied with, but, owing to the ignorance or carelessness of the clerk, there was a failure to note them on the record. Some weeks after the adjournment of the term, counsel, discovering these omissions, sued out this writ of *habeas corpus*, to have declared null and void a proceeding to which, during its entire progress, they had offered no word of objection. It was to prevent such action that the statutes under review were passed.

*Judgment affirmed.*

## JOSEPH H. GILL v. SARAH E. JONES ET AL.

57	867
78	806

1. UNLAWFUL ENTRY AND DETAINER. *Writ of error. Supreme Court.*

A writ of error or appeal lies to the Supreme Court, by virtue of Code 1871, §§ 409, 410, 411, from a judgment rendered in the Circuit Court, upon appeal from the special tribunal organized under the act in relation to unlawful and forcible entry and unlawful detainer, which is silent as to the finality of such judgment.

2. SAME. *Judgment of dismissal. Appeal to Circuit Court.*

A judgment of dismissal, in such a proceeding, by the justices of the peace, for want of prosecution before them, does not conclusively settle the rights of the parties litigant, but is such a final determination of the suit that the Circuit Court has jurisdiction of an appeal therefrom.

3. SAME. *Variance. Dower. Description.*

The land described by metes and bounds, in the report of commissioners who set off dower, is that to which the widow is entitled although they state a wrong section ; but in her suit to recover the land the defendant can prove the variance, if she does not allege the true section.

ERROR to the Circuit Court of Franklin County.

Hon. J. B. CHRISMAN, Judge.

Sarah E. Jones, her husband joining for conformity, brought this action of unlawful entry and detainer to recover possession of SE $\frac{1}{4}$ , section 21, of a certain township, as her dower, from which, after its allotment to her, she had been forcibly ejected by Joseph H. Gill. The special court when organized, dismissed the case at the plaintiff's cost for want of prosecution, and she appealed to the Circuit Court, where there was a jury trial, with a verdict and judgment for the plaintiff, for possession of the land. Thereupon Joseph H. Gill brought the case here, assigning, among other errors, the exclusion by the Circuit Court of his evidence that the land of which he took possession was not in section 21, but was in section 28, to which he held a deed.

*H. Cassidy*, for the plaintiff in error.

1. The Circuit Court had no jurisdiction of the appeal. When the plaintiff, in this statutory proceeding, failed to appear before the special tribunal brought into being by the

means provided, it ceased to exist. Never having acted on the merits, or rendered the judgment which the justices were authorized to give only after trial, there was nothing from which the statute authorized an appeal. The law contemplates a judgment, awarding possession or refusing it, and from such final determination alone can an appeal be prosecuted. Code 1871, §§ 1589, 1593, 1594. The order made in this case simply dissolved the court, leaving the plaintiff where she was before she filed her complaint. This is a question of want of jurisdiction over the subject-matter, and can be made here, although not raised in the Circuit Court. *Green v. Creighton*, 10 S. & M. 159; *Leater v. Harris*, 41 Miss. 668.

2. Evidence to show that the land of which the defendant took possession was not in section 21, as was that described in the complaint, was offered and excluded. It was pertinent to show that the plaintiff was not deprived of possession of land in section 21, as claimed, and the exclusion of such evidence was error. The deed was pertinent to show the character of the defendant's possession, which will be presumed to be under the legal title. *Rabe v. Fyler*, 10 S. & M. 440; *Cummings v. Kilpatrick*, 23 Miss. 106.

*M. Green*, for the defendants in error.

1. It is no answer to a suit for land in section 21, to prove that the defendant owns land in section 28. The action cannot affect the latter land; and, if the property which the plaintiff should have sued for is that last described, such fact is not of itself a defence against her suit for the former real estate.

2. The Supreme Court has no jurisdiction to try an appeal or writ of error in a suit for forcible entry and unlawful detainer. That remedy is special and limited, and wholly statutory. It is summary, and the judgment does not bar trespass or ejectment. Code 1871, § 1598. The measure of the jurisdiction, original or appellate, is the language of the special statute, and the case is not covered by Code 1871 § 409. Appeals are allowed to the Circuit Court (Code 1871, § 1594); but there is no provision for bringing such cases to this court. No jurisdiction in this regard can be implied, for it is extraordinary, and must be strictly construed.

GEORGE, C. J., delivered the opinion of the court.

This writ of error is prosecuted to revise the judgment of the Circuit Court, rendered in a proceeding of forcible entry and unlawful detainer. It is insisted on behalf of the defendant in error, that, as the statute authorizing such proceedings provides for an appeal to the Circuit Court, but fails to provide specially for an appeal or writ of error to revise the action of that court, its judgment is final, and this writ of error must be dismissed for want of jurisdiction. We do not consider this position well founded. Writs of error or appeals may be prosecuted from any final judgment of a Circuit or Chancery Court, by virtue of Code 1871, §§ 409, 410, 411, except only in cases where by statute a special provision is made to the contrary. When a judgment has been rendered in the Circuit Court, it is the judgment of that court, whether it be rendered in a cause originating there, or brought up by appeal. In some instances the appellate jurisdiction of the court has been denied to revise judgments rendered in the Circuit Court in causes which were appellate in that court; but this denial has been predicated upon some provision in the statute, which made the judgment of the Circuit Court final. *Dismukes v. Stokes*, 41 Miss. 480; *Mississippi Central Railroad Co. v. Kennedy*, 41 Miss. 551.

But if there is no provision restricting or denying the right of appeal, or the right to a writ of error, as to any particular judgment rendered in the court, the right has uniformly been held to exist. In *New Orleans Railroad Co. v. Hemphill*, 35 Miss. 17, 20, it was denied by counsel that a writ of error lay to revise the judgment of the Circuit Court, rendered on an appeal from the proceedings of a jury of inquest to assess damages for the appropriation of land to the use of a railroad company. But the court said: "The act does not declare in terms that the judgment in these cases, either affirming or setting aside the inquest, shall be final. It is, in fact, perfectly silent on the subject. Judgments of the Circuit Courts, in such cases, are left to stand precisely on the same footing with all other judgments of those courts." This case is an authority exactly in point, as the act on the subject of unlawful and forcible entry and unlawful detainer proceedings is silent as to

the finality of judgments rendered in the Circuit Court upon appeals taken from the special court organized to try such proceedings.

It is urged, however, on behalf of the plaintiff in error that the Circuit Court had no jurisdiction, and that the appeal to that court should be dismissed. He insists that the judgment rendered by the justices of the peace, being a dismissal of the complaint for want of prosecution before them, was not a final judgment; that the plaintiff was not concluded by it, and had a right to institute his suit anew, and that therefore no appeal to the Circuit Court will lie. It is true that the judgment of dismissal for want of prosecution does not finally determine the rights of the parties litigant, but it is a final determination of that suit. Under statutes allowing appeals only after final judgment, the decisions have been uniform, so far as our researches extend, that the judgment is to be understood as final if it puts an end to the particular suit in which it is rendered, whether it finally determines the rights of the parties or not. Freeman on Judgments, §§ 12, 16, and authorities cited.

On the merits of the case, a new trial must be granted. The complainant asked for the recovery of the SE $\frac{1}{4}$  of section 21, alleged to have been set apart to the plaintiff as dower. On the trial, the defendant offered to show that the land of which he took possession was in section 28. This offer was refused by the court, and, as we think, wrongfully. The defendant was not called upon to make any defence, except as to land in section 21, and the evidence offered was pertinent to his defence. We infer from the evidence that the commissioners, who set off the dower of the plaintiff, made the allotment by metes and bounds, and that they gave her land mentioned in their report as being in sections 21 and 22; but that in marking the boundaries they included land in section 28, now claimed by the defendant, supposing it, however, to lie in section 21. If their report shows, by the metes and bounds mentioned in it, that land in section 28 was set apart as part of her dower, she would not be deprived of the right to claim to the line marked by the commissioners, because they made a mistake in supposing it to be the line between



sections 21 and 28. The marked line set out and designated in their report, so as to be capable of being identified from the marks and description given in the report, would govern; but this does not give her the right, under her complaint describing land claimed as in section 21, to recover other land outside of that section. If she desires to recover land in section 28, she must amend her complaint, so as to describe correctly the land she claims.

*Judgment reversed and new trial granted.*

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ROBERT BRECKENRIDGE v. ROSA JOHNSON ET AL.

1. **AGRICULTURAL LIEN LAW.** *Jurisdiction. Void writ of seizure.*

A writ of seizure for one hundred and eighty dollars, under the agricultural lien law (Acts 1876, p. 109), is void, if issued by one justice of the peace returnable before another; and the officer who takes property thereunder is a trespasser.

2. **SAME.** *Circuit Court. Jurisdiction. Appearance. Waiver.*

After the owner of the property seized has taken it from the officer by an action of replevin, the return of the writ of seizure to the Circuit Court does not give jurisdiction; nor is such owner's motion to dismiss the lien suit a waiver of its nullity.

3. **SAME.** *Replevin for property seized. Amendment. Res judicata.*

The owner, who has given bond and holds the property, is entitled to judgment in the replevin suit, notwithstanding the Circuit Court, after amending the writ of seizure, has rendered judgment against him for the debt in the lien proceeding.

**ERROR** to the Circuit Court of Claiborne County.

Hon. J. B. CHRISMAN, Judge.

*J. D. Vertner*, for the plaintiff in error.

The plaintiff in error should have recovered all the cotton in this action of replevin, because the proceedings under the writs of seizure were so defective as to be void. No writ can be issued by one justice of the peace returnable before another. Code 1871, § 1307, provides that the justice before whom the complaint is made shall determine the cause. The statute must be followed. *Ford v. Woodward*, 2 S. & M. 260; *Tucker*

v. *Byars*, 46 Miss. 549; *Warren v. African Baptist Church*, 50 Miss. 223; *Morris v. Shryock*, 50 Miss. 590. Suits under the agricultural lien law (Acts 1876, p. 111) are tried like other cases in justices' courts. The writ of seizure issued at the suit of Rosa Johnson was beyond the justice's jurisdiction, and, being void on its face, the officer who seized the products thereunder was a trespasser. Tampering with the writ, after Breckenridge, by an independent action of replevin, had taken the property from the officer who seized it, could not affect the replevin suit. Moreover, the Circuit Court had no power to amend the process, because it was void. Freeman on Executions, § 15; Freeman on Judgments, §§ 116-126. Nor could the motions of Breckenridge give the Circuit Court jurisdiction. In the case of *Dogan v. Bloodworth*, 56 Miss. 419, the court, under the writ of seizure, had jurisdiction of the subject-matter, and the only defect was the want of a personal summons to the defendant. In that case, his appearance cured the defect. But in this suit the seizure was void; the Circuit Court had no jurisdiction of the subject-matter; and the writ of seizure, being peculiarly a proceeding *in rem*, the personal appearance of Breckenridge, after he had taken the property by replevin from the officer, could not make the void proceeding valid. *Stockett v. Nicholson*, Walker, 75.

*A. J. Lewis*, for the defendants in error.

The judgment of the Circuit Court should be affirmed. Rosa Johnson's affidavit conformed strictly with the law under which her suit was brought (Acts 1876, p. 109); and the amount demanded conferred exclusive jurisdiction on the Circuit Court. *Fenn v. Harrington*, 54 Miss. 733. The insertion in the writ of another justice's court instead of the Circuit Court was a mere clerical error, and did not vitiate the process. *Lovelady v. Harkins*, 6 S. & M. 412; *Byrd v. Hopkins*, 8 S. & M. 441; *Houston v. Belcher*, 12 S. & M. 514. The defect was amendable on principle and by the language of the agricultural lien law. Acts 1876, p. 113, § 10; Code 1871, §§ 666, 712; *Miller v. Northern Bank of Mississippi*, 34 Miss. 412; *Bloom v. Price*, 44 Miss. 73; *McClanahan v. Brack*, 46 Miss. 246. The plaintiff in error, however, has waived all irregularities by his appearance in the Circuit Court, and motions to dis-

miss. *Harrison v. Agricultural Bank*, 2 S. & M. 307; *Dan-dridge v. Stevens*, 12 S. & M. 723; *Fisher v. Battaile*, 31 Miss. 471; *Hathcock v. Owen*, 44 Miss. 799. But, whatever may have been the irregularities of the writ and the proceedings under it, the cotton in controversy was in custody of the law, and could not be liberated, except in the mode provided by the statute which authorized the original seizure. Where a new right is given by statute, and a specific remedy provided, the right can be vindicated in no other way than that which the statute provides. Sedgwick on Stat. & Const. Law, 343. The agricultural lien law provides a forthcoming bond as the exclusive remedy of a defendant who designs contesting the suit, and replevin is nowhere recognized. Acts 1876, p. 113, §§ 8, 10. The statutory remedy is exclusive, and must be pursued. *Kendrick v. Watkins*, 54 Miss. 495; *Dogan v. Blood-worth*, 56 Miss. 419.

GEORGE, C. J., delivered the opinion of the court.

On February 26, 1878, Rosa Johnson, one of the defendants in error, made oath in due form of law, claiming a lien on certain cotton raised on a plantation leased by the plaintiff in error. She asserted her lien as a laborer, under the act of April 14, 1876, entitled "An Act to provide for Agricultural Liens, and for other purposes." Acts 1876, p. 109. The amount of her lien as claimed, was one hundred and eighty dollars. At the same time, each of the other defendants in error made an affidavit asserting for himself a similar lien on the same property, but for amounts less than one hundred and fifty dollars. The several affidavits were made before one E. J. Smith, a justice of the peace of Claiborne County, who thereupon issued the appropriate writs, under the provisions of the act above mentioned, except that he made each writ returnable before one Daniel Willis, another justice of the peace of said county, "on the regular term of said Willis' court." These writs were placed in the hands of the sheriff, who, on the next day, seized seven bales of cotton, under the writ in favor of Rosa Johnson, and five bales under one of the other writs, and three bales under the third one. On March 1, 1878, Breckenridge, the principal defendant and

debtor in the writs, sued out from the circuit clerk's office of Claiborne County his writ of replevin, in which the sheriff was made a party defendant. This writ was executed by the coroner, who seized the cotton, and delivered it to Breckenridge, upon his executing the proper bond, the defendant waiving his right to give the bond. On the motion of the sheriff and of the defendants in error, they were substituted as defendants to the action of replevin.

On the trial of this action, the questions of law and fact were submitted to the judge by consent of parties. The foregoing facts were brought before the judge, on an agreed statement of the facts of the case; and, in addition, it was agreed that the record in the case of *Rosa Johnson v. Breckenridge* in the lien suit should be also submitted as evidence to the court. From this record, it appears that, in some way not explained, the writ issued by Smith, the justice of the peace, in favor of Rosa Johnson, and made returnable before Willis, another justice of the peace, had actually gotten into the circuit clerk's office, and was by the clerk docketed as a cause originating in that court. In January, 1879, Breckenridge made a motion to dismiss that case for want of jurisdiction, and then withdrew it, and thereupon immediately the plaintiff therein moved the court to have the writ amended so as to make it returnable to the Circuit Court, instead of before the said Daniel Willis. This motion was granted. The cause was then submitted without any pleadings, other than the affidavit or petition of the plaintiff, to a jury, who returned a verdict in the usual form for an action of assumpsit, for one hundred and eighty dollars; and the court thereupon rendered a personal judgment against Breckenridge for the amount of the verdict and interest. After this, Breckenridge moved to set aside the judgment, and to dismiss the cause for want of jurisdiction. There is no evidence in the record that Breckenridge took any part whatever in the Circuit Court in this cause, except to make the motion to dismiss for want of jurisdiction. On this evidence, the circuit judge found in the replevin suit against the defendants in error, except Rosa Johnson, and rendered judgment on her claim for the return of the cotton or the payment of the sum of one hundred and eighty dollars and inter-

est. From this judgment Breckenridge sues out this writ of error.

We think the court erred in rendering judgment against Breckenridge. The writ under which the cotton was seized for Rosa Johnson's benefit was void. On its face it demanded a debt beyond the jurisdiction of a justice of the peace, and it was made returnable before a justice of the peace. It was therefore void on its face, and furnished no authority to the sheriff to do any act whatever under it. He was a trespasser in taking the cotton, and his act did not deprive Breckenridge of his right of possession. He had no authority to return the writ to the Circuit Court. The writ plainly commanded its return to another court; and if the writ had any force whatever, its effect was to allow of a return nowhere else than into the court named in it. But it was an utter nullity, and the sheriff had no power whatever to act under it. The motion of Breckenridge in the Circuit Court to dismiss it for want of jurisdiction was no waiver of its nullity; it was, on the contrary, an assertion of it. As the writ was illegally returned into the Circuit Court, that court had no jurisdiction to amend it. When a suit is commenced in a court having no jurisdiction, it is not in the power of its ministerial officers to transfer it to another court which has jurisdiction. The proper mode is to dismiss it, and then commence anew in the proper court. It cannot be successfully urged that it was a mistake of the justice of the peace that caused the suit to be instituted in a court having no jurisdiction; for, whatever may have been the excuse for it, still the fact exists that the suit was actually instituted in a court having no jurisdiction over the subject-matter; and all the legal consequences follow from such an illegal commencement of the suit.

*Judgment reversed, and judgment here for plaintiff in error.*

## J. W. HUGHES v. P. O. THWEATT ET AL.

1. CHANCERY PLEADING. *Plea. Assignee of note. Want of consideration.*  
A plea of total want of consideration is sufficient in law to a bill in chancery by the assignee of a promissory note to foreclose a mortgage on real estate executed by the maker to secure it. Code 1871, § 2228.

2. SAME. *Reply to plea of want of consideration. Fraud.*  
In order to show that there was a consideration, the complainant should take issue on the plea ; or, if the maker executed the note and mortgage to defraud his creditors, that fact should be replied.

3. BANKRUPTCY. *Assignee. Appeal.*  
A bankrupt may appeal from an adverse decree, if his assignee, who has been made a party to the suit, fails to plead or assert any claim in behalf of creditors.

APPEAL from the Chancery Court of Claiborne County.

Hon. THOMAS Y. BERRY, Chancellor.

J. D. Vertner, for the appellant.

The complainants are not *bona fide* holders of the notes ; but, by virtue of Code 1871, § 2228, the want of consideration can be pleaded against them. The mortgage is an executory contract ; and even if the complainants had replied fraud, the rule *In pari delicto potior est conditio defendentis* would render the reply insufficient in law. They cannot rebut the defence of want of consideration, either by direct evidence showing that the notes were given with a view to defraud the mortgagor's creditors, or by arguing from the facts stated in the plea that they were so given. *Wearse v. Peirce*, 24 Pick. 141. The appellant has an interest in his property, notwithstanding his bankruptcy, and until his assignee assumes to protect it for him and his creditors, he can do so himself.

E. S. Drake, for the appellees.

To construe the statute (Code 1871, § 2228) as authorizing a plea of want of consideration in a case like this will make it a means of fraud. The statute was designed to protect innocent persons who make notes under a supposed consideration, which afterwards turns out not to exist. But the notes here, as the record shows, were executed, like the mortgage,

in order to defraud the maker's creditors. Hughes cannot take advantage of his own wrong. The fraud is apparent upon the face of the plea. To deliberately put notes upon the market, in the name of his wife, who received full value, and then plead want of consideration to the suit upon the notes, amounts to a fraud upon the public. The assignee having been made a party to the suit, Hughes cannot prosecute this appeal. He has no interest in the subject-matter, and is not a proper party defendant to the suit. *Bass v. Nelms*, 56 Miss. 502.

CHALMERS, J., delivered the opinion of the court.

P. O. Thweatt and Greenfield Quarles, partners under the firm name of Thweatt & Quarles, filed their bill against J. W. Hughes, alleging that they were the assignees for value of two notes executed by him to his wife, which were protected by a mortgage on real estate, and praying for a foreclosure of the mortgage by sale of the land. The defendant, by formal plea, averred that the notes were totally without consideration, having been by him executed to his wife at a time when he owed her nothing. This plea, having been set down for argument by the complainant, upon its sufficiency in law, was adjudged insufficient by the court.

We see no legal objection to the plea. It was proper and even technical in form, and certainly good in substance, under Code 1871, § 2228, which entitles the maker of promissory notes to plead against assignees "all want of lawful consideration, failure of consideration, payments," &c., &c., "in the same manner as though the suit had been brought by the obligee or payee." It is suggested by counsel that the action of the court was based upon the idea that the plea showed that the notes and mortgage had been executed by the husband to his wife in fraud of his creditors, and that therefore he could not resist payment of them in the hands of *bona fide* purchasers. This is not true. There is no suggestion of any sort in the plea, except that the notes were wholly without consideration, and therefore void, and, having been set down as insufficient in law, it must be judged by its language, and not by inferences or arguments. If the fact suggested by counsel is true, the complainant should have replied to the plea; or, if he desired to show that there was a consideration

for the notes, he should have taken issue on it. Code 1871, § 1023.

There is no merit in the suggestion that this appeal cannot be prosecuted by Hughes because the record shows that he had been adjudged a bankrupt. The assignee in bankruptcy having been made a party declined or failed to plead, and must therefore be regarded as having declined to assert any claim on behalf of creditors.

*Reversed and remanded, with leave to reply to the plea.*

57	378
72	1055
57	378
85	380
57	378
91	474

### TOWN OF MACON v. JOHN W. PATTY.

1. MUNICIPAL CORPORATION. *Police power. Local assessment. Streets.*  
While a local assessment requiring each lot-owner on a street to improve the carriage-way in front of his property is unconstitutional, the paving and repairing of the sidewalk may be imposed on him as a police duty.
2. SAME. *Fire limits. Non-combustible pavement.*  
A municipality, whose charter enables it to provide for the prevention of fires and the construction and repair of sidewalks, may, in the exercise of its police power, require sidewalks within its fire limits to be paved with bricks.
3. SAME. *Street repairs. Discretionary power. Delegation.*  
The board of mayor and aldermen of the municipality, who are authorized to determine when the sidewalks are out of repair, cannot delegate such power to a street committee.
4. POLICE POWER. *Local assessments. Sidewalks. Materials.*  
Police power explained and defined, and distinguished from local assessments for improving streets; and the effect of location, use, and like circumstances discussed in determining what materials may be required in sidewalks.
5. LOCAL ASSESSMENTS. *Source. History and principles.*  
Local assessments explained and their judicial history given, with the grounds on which they rest and the principles by which they are regulated, with especial reference to streets in towns and cities.
6. SAME. *Land. Public use.*  
A local assessment which applies to land alone, and is incident to its location, is the regulation of the management of an interest common to the persons of a district and the general public, so that those who enjoy the benefits shall equally bear the burden.



7. **LOCAL ASSESSMENTS.** *Eminent domain. General taxes.*

The power to make local assessments is distinct from the right of eminent domain, and, though a taxing power, it is special and peculiar, and is not regulated by the constitutional provisions as to equality and uniformity on an *ad valorem* basis.

8. **SAME.** *Limitations on the power. Apportionment.*

The power is, however, not arbitrary; but among the limitations, arising from its nature and that of the taxing power, which the courts will enforce, is the one that the assessment cannot be imposed upon an individual, but must be apportioned among a sub-district of several.

9. **SAME.** *Constitutional law. The conservative principle.*

The constitutional prohibition against taking for public use without compensation, restrains not only the right of eminent domain, but all invasions of private property by public authority, including the exaction of money under the guise of taxation, beyond the limits of the taxing power.

10. **SAME.** *Object. Improvement. Rate.*

The object of the assessment must be public, but not so exclusively public as to prevent its imposition in a particular locality; its proceeds must be expended on an improvement plainly exceptive and beneficial to the property on which it is imposed, and its rate must not be excessive, beyond the cost of the improvement.

11. **SAME.** *Sub-district. Enforcement.*

It is levied, under authority derived from the legislature, on property in a district created for the purpose, and enforced by the summary remedies for collecting taxes, but is exceptional in time and locality, and ceases with the accomplishment of its object.

12. **SAME.** *Public benefit. Consent of property-owners.*

When the district is less than a legal subdivision of the State, an assessment for an improvement, in the use of which the general public are interested, is invalid without the consent, in some way expressed, of the people of the district. Per GEORGE, C. J.

13. **SAME.** *Streets. Municipal ordinance.*

An ordinance is valid if it requires all the streets in the town to be paved, and assesses the property-holders of each street with the costs of their street; or if much of the town has been improved by local assessments on the several streets, and it provides similarly for paving the remainder.

14. **SAME.** *Improving streets. Consent of property-owners.*

If, however, the municipality selects a part of the streets to be improved in that way, or selects a part to be improved in a manner exceptionally expensive as compared with the remainder, the persons on whom the burden is cast have a right to be consulted. Per GEORGE, C. J.

ERROR to the Circuit Court of Noxubee County.

Hon. JAMES M. ARNOLD, Judge.

The charter incorporating the town of Macon provides that the board of mayor and aldermen shall have power, within the town, by ordinance, to assess, levy, and collect taxes; to make regulations to secure the general health of the town; to prevent, abate, and remove nuisances at the expense of owners or occupants upon whose grounds they may exist; to establish, widen, grade, pave, or otherwise improve streets, and to clean them and keep them in repair; to provide for the prevention and extinguishment of fires; to require every male inhabitant of the town to work ten days in each year on the streets or pay five dollars in lieu of such work; to remove all obstructions from the sidewalks; and to provide for the construction and repair of the same.

*Jarnagin, Bogle & Jarnagin*, for the plaintiff in error.

1. The question is as to the power of the corporate authorities of the town of Macon, under the charter, to pass and enforce the ordinance to compel lot-holders to repair the sidewalks in front of their property. The legislature may constitutionally confer upon a municipal corporation the power to grade, pave, or improve streets by local assessment upon the persons or property benefited, or at the expense of the abutting lots. 2 *Dillon Mun. Corp.* §§ 481, 596; *Willard v. Presbury*, 14 Wall. 676; *United States v. New Orleans*, 98 U. S. 381; *Daily v. Swope*, 47 Miss. 367. Municipal powers are such as are conferred in express words by the charter or implied from those granted or incident thereto. 1 *Dillon Mun. Corp.* § 55. The municipality may exercise all powers which are reasonably proper to give effect to the authority bestowed by its charter. *New London v. Brainard*, 22 Conn. 552. Unless restricted, it may select means adapted to the end, and is not confined to a single mode of operation. *Bridgeport v. Housatonic Railroad Co.*, 15 Conn. 475; *Mobile v. Yuille*, 8 Ala. 137.

2. The charter of the town of Macon authorized the board of mayor and aldermen to provide for building and repairing sidewalks and remove obstructions therefrom, but did not prescribe the mode of constructing and refitting, nor the nature of the repairs to be made. The power, therefore, carried with

it authority to employ the ordinary means used by such corporation for its exercise. *United States v. New Orleans*, 98 U. S. 381; 1 Dillon Mun. Corp. § 58. Authority to make pavements implies the duty of determining the necessity therefor, and power to restore them includes the right to decide when they need repairing.

3. If the ordinance under consideration is within the powers contained in the charter, it is not essential that it should be a valid local assessment, but it can be sustained as a police regulation. The town is authorized to establish fire limits, and the requirement of brick pavements is not so onerous as the prohibition, within such precincts, of wooden buildings, which was sustained in *Alexander v. Town Council*, 54 Miss. 659. It is also empowered to prevent and remove nuisances. A lot-owner can be required, under the police power, to remove obstructions from the sidewalk in front of his lot. *Goddard, Petitioner*, 16 Pick. 504. An inflammable pavement is as much a nuisance in a crowded town as one covered with snow, or out of repair. In the case of *Mayor v. Maberry*, 6 Humph. 368, as in the case at bar, the sidewalk was by ordinance declared a nuisance, and on the owner's refusal to repair it, the municipal authorities proceeded to do so at his expense. The ordinance is clearly, on a fair construction, within the charter powers of the municipality.

*Rives & Rives*, for the defendant in error.

1. The legislature had no right to order Patty to repair the sidewalk in front of his property, and could not delegate a power which it did not itself possess. The authority cannot be referred to the general police power of the State. Some cases, following *Goddard, Petitioner*, 16 Pick. 504, distinguish between streets and sidewalks, affirming a power as to the latter which they deny as to the former, on the ground that keeping the pavement free from obstructions imposes only a light burden on each property-holder, who from his situation is able to perform the duty with the promptness which the benefit of the community requires. But *Goddard* was commanded to remove snow, not to pave the footway. Even that power has been denied, and on the better reason. *Gridley v. Bloomington*, 68 Ill. 47. The city, not the adja-

cent property-holder, owns the sidewalk. On what principle can the subject be required to do little and not much; or to shovel snow when he cannot be compelled to hod brick? Who is to decide how much time, money, and labor the citizen can be constrained to expend? It is no answer to say that the sidewalk is the limit, for who can tell how wide it shall be or how expensively finished? Oppression has no limit, if the citizen can be coerced to remove obstructions from a foot of public land, or spend a cent for its improvement. The doctrine, if once admitted, can be used to rear pyramids. The legislature may make the street a taxing district, and assess the expense of the improvements upon the contiguous property in proportion to frontage, but power to provide that each lot shall pay the whole cost of the construction upon which it abuts cannot be exercised by a constitutional government. *Cooley Const. Lim.* 501, 508. The authority claimed cannot be referred to the power to make local assessments. The State cannot direct a topical tax for local improvements without the express consent of a majority of those to be benefited. The converse proposition would destroy the citizen's right of property, and make him the mere agent of the government in its management. The impost must be made upon some rule of apportionment, and have reference to the benefit conferred and the value of the property assessed. *Const., art. 12, § 20.* This section was not contained in the Constitution under which *Smith v. Aberdeen*, 25 Miss. 458, was decided. It was, therefore, beyond the legislative power to authorize the ordinance.

2. Under the charter, however, the town had no such power, even if the legislature could constitutionally confer it. The municipality has only such powers as are clearly given by the charter or indispensable to its existence, or to the exercise of authority expressly granted. Reasonable doubts are resolved against the grant. *Cooley Const. Lim.* 192; 1 *Dillon Mun. Corp.* § 55. The power of taxation is not to be extended by construction; and authority to make improvements does not carry with it the right to tax the adjacent property for the expenses. 2 *Dillon Mun. Corp.* §§ 605, 606; *Willard v. Presbury*, 14 Wall. 676.

*Orr & Sims*, on the same side.

1. No authority is conferred on the mayor and aldermen in the charter of Macon to require lot-owners to pave the streets in front of their lots. A municipal corporation can exercise such powers only as are expressly or impliedly granted by its charter, and even those are to be strictly construed. 1 Dillon Mun. Corp. § 55, note; *Leonard v. Canton*, 35 Miss. 189; *Cooley on Taxation*, 209, 418, 420; *Cooley Const. Lim.* 194, 195; *Sharp v. Speir*, 4 Hill, 76; *Lowell v. French*, 6 Cush. 223. The streets and sidewalks must be kept in order by means of the general tax which the charter gives authority to levy and collect. *Cooley on Taxation*, 418, 420; 2 Dillon Mun. Corp. § 607; *Mobile v. Dargan*, 45 Ala. 310.

2. The order to the defendant in error to repair the sidewalk was signed by persons styling themselves "street committee," and did not proceed from the mayor and aldermen, who alone could, in any event, have authority to make it, under the town charter. Who is to determine the existence of the nuisance? How and on what notice shall it be abated, and from whom must the notice come? The mayor and aldermen cannot delegate, even if they possess, such powers. Dillon Mun. Corp. §§ 60, 308, 312, 642, 643; *Cooley Const. Lim.* 204, 353, 364; *Furhman v. Huntsville*, 54 Ala. 263.

GEORGE, C. J., delivered the opinion of the court.

The Board of Mayor and Aldermen of the town of Macon passed an ordinance in September, 1873, by which they required every owner or claimant of a lot fronting any public street in said town, to make a sidewalk of certain specified dimensions along the whole of his property, and to keep the same in repair, when required to do so by a resolution of the board. The sidewalks within certain defined limits on Jefferson Street were required to be of whole brick; all other sidewalks were to be of brick, plank, sand, gravel, or other substance capable of being smooth and hard. It was also provided that "all sidewalks which shall not be put in condition according to the orders of the board, and within the time prescribed, and thereafter kept in repair, are hereby declared nuisances, to be abated as other nuisances." In July,

1878, A. Klaus and J. N. Holman, styling themselves "street committee," addressed a letter to Patty, the defendant in error, in which they notified him to have the sidewalk in front of the residence then occupied as a millinery shop placed in good repair with whole brick immediately; and that, if the order was not complied with, the street committee would have the work done at his expense; and they requested an answer as to his intention in respect to complying with the order. Three days after the date of the above letter, Patty replied to it, declining compliance on the following grounds: 1st. That the sidewalk did not belong to him, but was public property, like other portions of the street. 2d. That the sidewalk compared favorably with the best sidewalks in the town. 3d. That the committee had no legal right to issue such order. The street committee thereupon proceeded to have a sidewalk laid, ninety-nine feet in length, in front of the property, at a cost of fifty-two dollars, for which sum the town of Macon brought this action before its mayor, and recovered judgment. By agreement of the parties the cause was taken to the Circuit Court by *certiorari*; and in that court judgment was pronounced, reversing the judgment rendered by the mayor, and dismissing the suit. From this judgment this writ of error is prosecuted.

It is now well settled with no dissenting voice, except in Iowa, that a local assessment requiring each lot-owner on a single street or part of a street to improve the street in front of his property at his own expense would be unconstitutional, because there would be no apportionment of the tax; and Judge Cooley says that such a law "would be nakedly an arbitrary command to each lot-owner to construct the street in front of his lot at his own expense, according to a prescribed standard; and a power to issue such command could never be exercised by a constitutional government, unless we are at liberty to treat it as a police regulation, and place the duty to make the streets upon the same footing as that to keep the sidewalks free from obstruction and fit for passage. But any such idea is clearly inadmissible." Cooley Const. Lim. 508. Burroughs takes the same position. Burroughs on Taxation, 469. And the cases are uniform to the same effect, except in Iowa. That the power

of making local assessments for local improvements is not regulated by the provisions of the Constitution of the State, which provide for uniformity and equality in taxation, on an *ad valorem* basis, has been settled by this court in *Daily v. Swope*, 47 Mass. 367, in a learned and elaborate opinion by Simrall, C. J. This opinion follows the authorities which sustain such assessments in other States having similar provisions in their Constitutions, and places this right in the taxing power of the legislature. *People v. Mayor of Brooklyn*, 4 N. Y. 419; *In re Washington Avenue*, 69 Penn. St. 351; *Lexington v. McQuillan*, 9 Dana, 513; *Burnes v. Atchison*, 2 Kansas, 454; *St. Joseph v. O'Donoghue*, 31 Mo. 345; *Burnett v. Sacramento*, 12 Cal. 76; *Yeatman v. Crandall*, 11 La. An. 220; *McGehee v. Mathis*, 21 Ark. 40; *Goodrich v. Winchester Turnpike Co.*, 26 Ind. 119; *Scovill v. Cleveland*, 1 Ohio St. 126; *Norfolk v. Ellis*, 26 Gratt. 224. Contra, *Mobile v. Dargan*, 45 Ala. 310. This power is also classed under the law of taxation in Sedgwick on Stat. & Const. Law (2d ed.), 426; 2 Dillon Mun. Corp., ch. xix. § 586; Cooley Const. Lim. 497, 498.

But, while these assessments are made under the taxing power, a very wide distinction has been taken between them and taxes for general purposes. On account of this essential difference, the courts have been enabled to reach the conclusion above referred to, that local assessments are not within the terms of constitutional restrictions on the subject of taxation. And this difference is even more clearly recognized in numerous cases which hold that statutory exemptions from taxation do not include exemptions from local assessments. Thus, in *The Matter of the Mayor of New York*, 11 Johns. 77, it was held that a statute which provided that no church or place of public worship should "be taxed by any law of this State" did not confer an exemption from an assessment to improve the street on which the church assessed was situated. And in *Baltimore v. Greenmount Cemetery*, 7 Md. 517, where the charter of the company provided that a certain number of acres of land "shall be for ever appropriated and set apart as a cemetery, which, so long as used as such, shall not be liable to any tax or public imposition whatever," it was held that the

exemption applied only to taxes or impositions for the purposes of revenue, and did not prevent the assessment on the cemetery by the municipal authorities of a due proportion of the cost of improving the street on which it was located. See, also, *Merrick v. Amherst*, 12 Allen, 500, and numerous cases cited in Cooley on Taxation, 147, and Burroughs on Taxation, 461. This distinction is so marked that it is held that the grant to a municipal corporation of the simple power to levy taxes does not authorize it to make local assessments for local improvements. 2 Dillon Mun. Corp. § 606, note 3; *Wright v. Chicago*, 20 Ill. 252; *Columbia v. Hunt*, 5 Rich. 550; *Chicago v. Wright*, 32 Ill. 192; *Annapolis v. Harwood*, 32 Md. 471; Cooley on Taxation, 418. This power, therefore, though it is a power of taxation, is a peculiar and special power, and is regulated by considerations distinct from those which regulate the taxing power.

A local assessment can only be levied on land; it cannot, as a tax can, be made a personal liability of the tax-payer; it is an assessment on the thing supposed to be benefited. A tax is levied on the whole State, or a known political subdivision, as a county or town. A local assessment is levied on property situated in a district created for the express purpose of the levy, and possessing no other function, or even existence, than to be the thing on which the levy is made. A tax is a continuing burden, and must be collected at stated short intervals for all time, and without it government cannot exist; a local assessment is exceptional both as to time and locality,—it is brought into being for a particular occasion, and to accomplish a particular purpose, and dies with the passing of the occasion and the accomplishment of the purpose. A tax is levied, collected, and administered by a public agency, elected by and responsible to the community upon which it is imposed; a local assessment is made by an authority *ab extra*. Yet it is like a tax, in that it is imposed under an authority derived from the legislature, and is an enforced contribution to the public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is like a tax, in that it must be levied for a public purpose, and must be apportioned by some reasonable rule among those upon



whose property it is levied. It is unlike a tax, in that the proceeds of the assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must enure to the property upon which it is imposed, or else the courts will interfere to prevent its enforcement. *Hammett v. Philadelphia*, 65 Penn. St. 146. The courts will also interfere to prevent an excessive rate, beyond the cost of the improvement. It is also within the power of the courts to judge whether the object for which it is made is public, and also whether it is so exclusively public as to prevent its imposition on a particular locality.

These differences have not always been borne in mind by courts in discussing the nature and extent of the power of local taxation. There seems to have been a diversity of opinion at first, as to whether the power should be referred to the right of eminent domain or to the power to tax. In *People v. Mayor of Brooklyn*, 6 Barb. 209, the Supreme Court of New York, in an able opinion drawn up by Justice Barculo, decided that a law authorizing a municipal corporation to make an improvement in a street, and to assess the cost on the property adjacent according to the benefit each lot should receive from the work, was an attempt to take private property for public use, under the power of eminent domain, and held the law unconstitutional because no provision was made for compensation. This case was taken to the Court of Appeals, and the judgment of the Supreme Court reversed. Mr. Justice Ruggles vindicated the conclusion to which the Court of Appeals arrived in a very learned opinion, in which he denied that the law was an attempt to exercise the right of eminent domain, but was a valid act under the taxing power. 4 N. Y. 419. Having reached this conclusion, he quoted from Marshall, C. J., in *Providence Bank v. Billings*, 4 Peters, 514, 568, as follows: "The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle which has its foundation in society itself. It is granted by all for the benefit of all. It resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals

or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right, that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused." "But the interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise legislation." And he further quoted from the same learned judge, in *M' Culloch v. Maryland*, 4 Wheat. 316, 428, as follows: "It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and the influence of the constituents over their representative, to guard them against its abuse." "And it is unfit for the judicial department to inquire what degree of taxation is the legitimate use and what degree may amount to the abuse of the power."

Under the influence of these doctrines, which were applied by Marshall, C. J., to the right of general taxation vested in the legislature of a State to provide a revenue for the public service, the Court of Appeals of New York reached the conclusion that this power of local taxation, being the same thing as the taxing power, was illimitable, with no other restriction than the discretion of the legislature and their responsibility to their constituents. On this point the court said: "The power of taxation, or of apportioning taxation, or of assigning to each individual his share of the burden, is vested exclusively in the legislature." These powers "are identical and inseparable. Taxes cannot be laid without appor-

tionment, and the power of apportionment is therefore unlimited, unless it be restrained as a part of the power of taxation." The court then proceeded to define the justice of local taxation imposed on those who are to receive the benefits to be derived from the expenditure; but they nowhere intimate that the power to levy the local tax is dependent upon the fact that its expenditure is a real local benefit, but state explicitly that the determination and judgment of the legislature on the subject are conclusive and cannot be revised by the courts. And in *The People v. Lawrence*, 41 N. Y. 123, 137, the same court announce the same doctrine, saying that there is no constitutional restraint upon the exercise of this power; that the right of determining what portion of the public burdens, by way of taxation, shall be borne by any individual or class of individuals, must be determined by the legislature; that, however much this power may be abused by the legislature, the only check upon it is the responsibility of the legislative body to its constituents, and that the judicial department can afford no redress. And to the same effect is *St. Joseph v. O'Donoghue*, 81 Mo. 345.

The courts having reached the conclusion, as before shown, that the restrictions in the various State Constitutions on the power of taxation, requiring taxes to be levied with equality and uniformity and on an *ad valorem* basis, did not apply to local assessments, this power was thus left practically without limit. The tax-payer was even deprived of that protection, stated by Marshall, C. J., to be the only safeguard against oppressive and unjust taxation, the accountability of the body levying the taxes to its constituents; for it is at once perceived that a legislature levying an imposition on a small district, in many instances not including a dozen tax-payers, were not under the ordinary influence exercised by constituents on their representatives. The tax-payer was in effect left, in the language of Robertson, C. J., in *Lexington v. McQuillan*, 9 Dana, 513, to "spoliation by a dominant faction, or by a rapacious public power, acting in obedience to a constituent body, for whose use his property may be taken, and from whom no similar contribution is required." It is true, it was said that the tax was for the benefit of the person who paid

it; that he received a full equivalent for the money exacted from him in the enhanced value of his estate; and that, though the object was so far public as to justify the interposition of the legislature in levying a tax, yet the benefit was private and individual, and ought therefore to be borne by those who received the advantage of the expenditure. But under the view which the courts had taken the legislature was the exclusive judge, and, in the plenitude of its power, could determine that the object was so far public as to authorize the imposition of the tax, and so far private as to authorize the assessment to be made on private persons on account of the benefits to be conferred by it, and could also judge of the necessity for and the extent of the improvement to be made. This inconsistency was strongly put by the Supreme Court of Wisconsin, in *Weeks v. Milwaukee*, 10 Wis. 242, 259. That court, in speaking of the improvement of a public street by local assessment, said: "In sustaining these assessments when private property was wanted for a street, it has been said the State could take it, because the use of a street was a public use; in order to justify a resort to the power of taxation, it is said the building of a street is a public purpose. But then, having got the land to build it on, and the power to tax, by holding it a public purpose, they immediately abandon that idea, and say that it is a private benefit, and make the owner of the lot build the whole of it." And the court reached the conclusion that the power to make local assessments, though a part of the taxing power, yet was special and peculiar, and was conferred on the legislature only, in virtue of a clause in the State Constitution recognizing the power of "assessment" as distinct from the power of taxation.

As the dangerous nature of the power began to be more and more recognized, when considered as a taxing power only, and therefore virtually without restriction, unless imposed by the Constitution, and as the courts had held that it was not within the constitutional restriction in reference to the taxing power, the judicial mind, giving more importance to those peculiarities which distinguished it from the taxing power pure and simple, began to discover restrictions and limitations arising from its nature and characteristics, as well as

from the nature and characteristics of the taxing power in general. In *Lexington v. McQuillan*, 9 Dana, 513, the city ordinance authorized the charge of paving a street in front of each lot to be levied on that lot alone, without reference to whether there would be inequalities in the cost, arising from a difference in the difficulties of doing the work in front of the several lots. There was no effort to apportion the cost of the whole improvement among the several lots, but each lot was made to bear the whole burden of the improvement in its front. This assessment was attempted to be defended upon the ground of the unlimited taxing power of the legislature. But the court said that the doctrine that the taxing power in this country is altogether arbitrary is alarming; that it was limited by some of the declared ends and principles of the fundamental law; that among these are equality as far as practicable, and security of property; that though exact equalization is unattainable and utopian, there are well-defined limits within which, practical equality may be preserved, and which should be deemed impassable barriers to legislative power; that, though taxation may not be universal, it must be general and uniform; that the legislature cannot exact from one citizen, or one county, the whole revenue of the commonwealth, for that would be taking private property for public use without compensation; that whenever the property of the citizen is taken and appropriated, without his consent, to the public benefit, the exaction is not a tax, unless similar contributions be made by that public itself, or shall be exacted rather by the same public will from such constituent members of the same community generally as own the same kind of property; that taxation and representation go together, and therefore when taxes are levied they must be imposed on the public, in whose name and for whose benefit they are required, and to whom those who impose them are responsible; that the citizen's property should not be taken by the public without his consent, or an equivalent in money, or in similar contributions by itself; that the legislature may make local taxing districts, composed of streets or parts of streets, for the improvement of these highways; that when this is done, each district must be regarded as a separate municipality in itself, with power to act

for itself as to the improvement for which it was created ; that this authority was duly conferred by the charter of Lexington in requiring the assent of a majority of the property-holders in the district to the improvement and assessment, or, in lieu of this, by requiring the unanimous consent of the city council, which necessarily included the consent of the member representing the ward of which the sub-district assessed was a part. The court admit, that there would probably be no reasonable objection to an ordinance requiring each lot in the city to bear the expense of the improvement in front of it, if it was required to be done in the same fiscal year ; but assert that one citizen cannot be compelled to pave any one street for any one year, or at any one time, upon the ground that other streets or portions of streets would thereafter be required to be paved in the same manner, and thus a like burden would fall on other citizens exclusively ; for such a prospective and contingent equalization of contribution to the public use would be too remote and uncertain to have the effect of equalization. And by this reasoning the court reached the conclusion that the ordinance was invalid for want of the apportionment necessary in taxation. In accordance with this decision, the courts everywhere, except in Iowa, hold that a local assessment, requiring each lot-owner on a single street, to improve the part of the street on which his property fronts, at his own expense, is unconstitutional ; and Judge Cooley says, as already quoted, that such a law would be an arbitrary command, inconsistent with a constitutional government. Cooley Const. Lim. 508. Some of the other doctrines, so ably announced in this case, have not received the same universal recognition.

The courts of New Jersey also reached conclusions very materially restricting the power of the legislature as to local assessments. In that State, the courts deduced not only the power from the actual benefit conferred on the tax-payer, but measured the reach of the power by a judicial ascertainment of the extent of that benefit. The courts there hold that the legislature cannot judge of the extent of the benefit, and cannot apportion the tax, except in proportion to the benefits conferred ; and that, if the benefits conferred do not equal the cost of the improvement, the excess of cost must be paid by

the public. They reached that conclusion by this reasoning : — that the justification for the assessment is that the lands upon which it is imposed receive a peculiar and exceptive benefit from the improvement; that the reception of such benefit prevents the assessment from being a taking of private property for the public use; that this principle is not applicable except when the benefit is commensurate with, or superior to, the burdens; for if the sum exacted exceed the benefit, as to that excess, there must be a taking of private property for the public use; since the consideration of this excess over the benefit must be the public use in virtue of which the legislature alone had power to interfere. *Tidewater Co. v. Coster*, 18 N. J. Eq. 518; *State v. Newark*, 27 N. J. 185; *State v. Newark*, 37 N. J. 415; *State v. Jersey City*, 37 N. J. 128; *State v. Hoboken*, 36 N. J. 291.

In Pennsylvania, similar though not identical conclusions were reached by reasoning in substance the same. *In re Washington Avenue*, 69 Pa. St. 352. The Supreme Court there held that the assessment was only justifiable on account of the exceptive benefit to the tax-payer to be conferred by its expenditure; that though the legislature may make the apportionment by the front foot measurement in cities and large towns, and where the density of the population along the street and the small size of the lots make it a reasonably certain mode of arriving at a just equalization of the burden, according to benefits, yet, this mode is but a substitute for an actual assessment by sworn jurors or assessors, and is allowable only because it practically arrives at a correct result in adjusting the burden according to the benefits. And in that case the court held, that the principle of the per foot assessment was inapplicable to the making of a public highway outside of a city or town; and it further referred the question of benefits to a master, who reported that the improvement was a general public benefit, and not of peculiar and exceptive advantage to the persons on whom the assessment was made; and on this finding by the master the court held it was incompetent for the legislature to impose a local assessment on property within one mile of the highway. And the court said, quoting from Judge Sharswood, in *Hammett v. Philadelphia*, 65 Penn. St. 146, 157, "Local assess-

ments can only be constitutional when imposed to pay for local improvements clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be imposed where the improvement is either expressed or appears to be for general public benefit." In that case, the court admit that the power to tax is unbounded by any express limit in the Constitution of Pennsylvania; and held that the provisions in the Bill of Rights declaring that acquiring, possessing, and protecting property, were inherent and indispensable rights; that other provisions, securing the people in their possessions from unreasonable seizures, prohibiting any person from being deprived of his property unless by the judgment of his peers or the law of the land, prohibiting the taking of private property for public use without just compensation, and securing to every man, for an injury done to his lands and goods, remedy by due course of law, and the administration of justice without sale, denial or delay, and prohibiting the impairing of contracts, — stamp upon private property an inviolability which cannot be frittered away by verbal criticism on each separate clause, thereby breaking "the united fagot, stick by stick," until the strength of the whole is gone. And the court then declared that taxation is bounded in its exercise by its own nature, essential characteristics and purposes; and it must therefore visit all alike in a reasonably practical way, of which the legislation may judge, but within the just limits of what is taxation; that it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction; to do this would be confiscation not taxation, extortion not assessment, and would fall within the clearly implied restrictions in the Bill of Rights, that laws which cast the burdens of the public on a few individuals, no matter what the pretence, or how seeming their analogy to constitutional enactments, are in their nature despotic and tyrannical, and to prevent their enforcement the judiciary must interfere.

This case was founded on the case of *Hammett v. Philadelphia*, *ubi supra*, which announces the same doctrines. In the last case, the court said that an assessment upon an individual



or a class for a general and not a mere local purpose, whether regarded as an act of confiscation, a judicial sentence or rescript, or a taking of private property for public use without compensation, equally transcends the legislative power; that whenever a local assessment upon an individual is not grounded upon, and measured by, the extent of his particular benefit, it is *pro tanto* a taking of private property for public use without compensation. And the court declare it to be the solemn duty of the judiciary "to guard and protect this right of property as well from indirect attacks under any specious pretext, as from open and palpable invasion." The Supreme Court of Illinois took a view similar to that of the courts of New Jersey. *Chicago v. Larned*, 34 Ill. 203; *Lee v. Ruggles*, 62 Ill. 427.

In tracing thus far the decisions in some of the most important States in the Union, on the subject of local assessments, we have seen the gradual rise of a revisory power of the courts over these public impositions, which has not been extended to taxation pure and simple; and we have also seen the recognition of the wide differences between the practical operation of the two powers. Proceeding upon the idea that the local assessment was no burden, because the benefits to be derived from the improvement were equal to the cost, another conclusion was reached, which we will now proceed to notice.

At first these local assessments were so insignificant in amount, as compared with the value of the property on which they were levied, that the right to have, as a remedy for their collection, a personal judgment against the owner was not challenged, and there are many instances in which such judgments were rendered. At length the spirit of speculation in town and city lots induced a pushing of street improvements far beyond the immediate necessities for them in the hope that the progressive enterprise and rapid growth of the towns and cities in which they were made would soon overtake them, and amply repay the costs in the enhanced value of the lots in the neighborhood. In many instances, these hopes were not realized and the cost of making expensive improvements on newly opened streets, which were but sparsely settled, was found to be so great as to induce a surrender

of the property assessed; but contractors for the improvements, to whom the assessments were assigned as their means of compensation, were unwilling to accept the property thus enhanced in value by the improvements for the cost of making them, and, after having exhausted this property, sought to collect the unpaid balance from the general estate of the owner. These attempts were resisted in the courts, and caused a more careful inquiry into the nature of these assessments. The conclusion was reached in California and Missouri, that it was not within the power of the legislature to make these assessments a charge beyond the property on which they were made. *Taylor v. Palmer*, 31 Cal. 240; *St. Louis v. Allen*, 53 Mo. 44. We agree that the result reached is correct; but a logical conclusion from the grounds upon which these assessments were justified would have been to confine the remedy to the increased value of the estate, caused by the improvement. For it was said in Missouri, in *Garrett v. St. Louis*, 25 Mo. 505, that the assessment was a tax, not on the property directly, but on the benefits to be conferred by the improvement. Judge Sharswood, in *Hammett v. Philadelphia*, *ubi supra*, said: "Whenever a local assessment upon an individual is not grounded upon and measured by the extent of his particular benefit, it is *pro tanto* a taking of his private property for public use without any provision for compensation." And the assessment was universally justified upon the ground that it was in fact no real charge or burden, because the owner who paid it was fully indemnified by the enhanced value of his property. It is not perceived that the wrong of imposing a burden on a man's property, on the ground that it is enhanced in value at least to the extent of the burden, and then selling the property thus enhanced to discharge the burden, whereby the owner loses his property through an obtrusive and uninvited effort on the part of the public to benefit him, differs, except in degree, from the injustice of a proceeding, in which to this same wrong is superadded the duty of paying a balance that may be due after exhausting the property supposed to be benefited. If the problem is to be worked out on the idea that the assessment is no burden, because the benefit will be equivalent to it, then, in case of the inability of the

owner to pay for the boon conferred on him, the remedy of the benefactor should be limited to the taking of so much of the estate as will represent the increased value imparted to it by his efforts.

But this theory rests on a false foundation, though the conclusion is just. The assessment is a burden and an exaction in behalf of the public. It is made for a public use. Public authority to enforce it can be justified on no other ground. Power does not exist in a constitutional government to compel a person to improve his estate for his own private benefit. This theory cannot receive the sanction of this court, for the reason that it is grounded on a violation of that clause of the Constitution which declares that "private property shall not be taken for public use, except upon due compensation first being made to the owner or owners thereof, in a manner to be provided for by law." In *Brown v. Beatty*, 34 Miss. 227, the High Court of Errors and Appeals of this State rightly decided that this compensation could not be made in estimated benefits thereafter to accrue from an improvement thereafter also to be made. The compensation must precede, not follow, the taking, and hence could not be affected by any thing that was to be done afterwards.

We must apply this provision in all cases, notwithstanding it has been said that it is only applicable to property taken under the right of eminent domain, which right does not extend to the taking of money. We agree that the most important use of this provision is to restrain the right of eminent domain; but that is not its whole force. For the prohibition is general and absolute: "Private property shall not be taken for public use, except upon due compensation," is the language of the Constitution. The prohibition is not as to the methods in which the appropriation may be made, but is a denial of the power to make it at all by any method, under any circumstances, and under any pretence whatever, unless compensation is first made. It was intended to secure the absolute inviolability of private property of all kinds against any and all invasions under public authority. If the right of eminent domain does not extend to the taking of money, this is no reason why that kind of property should not come within

the protection of this clause of the Constitution ; but, on the contrary, the absence of the right is but an additional safeguard for its protection. It is true that money exacted from the citizen, in the way of lawful and constitutional taxation, is not within the meaning of this clause, because it is taken in discharge of a debt to the State or public. But, if under the guise of taxation money is attempted to be exacted beyond the limits of the taxing power, it is a violation of the security afforded by this clause of the Constitution. Chief Justice Marshall of Kentucky, in *Cheaney v. Hooser*, 9 B. Mon. 330, 341, said : " There being no express constitutional declaration or prohibition applicable to the power or subject of taxation, and none which in terms secures equality or uniformity in the distribution of public burdens, either general or local, there is no clause to which the citizen can with certainty appeal for protection against an oppressive and ruinous discrimination under color of the taxing power, unless it be that which prohibits the taking of private property for public use without compensation." " This is the great conservative principle of the Constitution, by which the rights of private property are to be preserved from violation by public authority ; and we shall feel bound to give it, as has heretofore been done, a liberal construction for the attainment of so important and valuable an object."

It is said, however (and that view is pressed with great force and plausibility in *People v. Brooklyn*, 4 N. Y. 419, heretofore commented on), that local assessments cannot be drawn within the purview of this clause of the Constitution, because taxation operates upon a community, and by some rule of apportionment; and the exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals. The distinction is a just one, but we cannot perceive that it has the force ascribed to it. The force of the argument, as we understand it, is, that a local assessment, because levied on a community and not on a single individual, cannot be made under the power of eminent domain, and therefore is not within the protection of this clause of the Constitution. If it be a valid local

assessment, the conclusion is just ; but the argument cannot be made to sustain the validity of the assessment itself, if that be the thing in question, unless we concede that every taking of private property not under the right of eminent domain must be a valid act, if only several, — a local community, instead of an individual, be the victim. This argument prevents individual acts of spoliation, but licenses a general pillage, and converts single acts of lawlessness into valid exercises of lawful authority, by the simple process of repetition. *In re Washington Avenue*, 69 Penn. St. 352 ; *Hammett v. Philadelphia*, 65 Penn. St. 146.

Since then it appears, that under the Constitution of this State, private property cannot be taken for the public use, under the plea, that due compensation is made by benefits arising from the appropriation ; and since it has also been shown that the taxing power may be limited and controlled by what Judge Marshall, in the passage heretofore quoted, called the great conservative principle of the Constitution, — the provision prohibiting the taking of private property for public use without due compensation, — it follows that the power to make local assessments in this State does not exist, if there be no other foundation for it than the equalization of the burdens with the benefits to arise from the local improvement.

We believe the power exists : it has been recognized as an existing power in the State by the public, the legislature, and by at least three decisions of this court. It may be difficult, perhaps impossible, to trace it to its proper source, and square its operation by logical rules, derived from a consideration of it as one of the precisely defined powers of the Constitution. It had its origin and development in the principle of local self-government, characteristic of free institutions, founded by the Anglo-Saxon race, — the leaving to each local community the due administration of the affairs in which it had an exceptive, peculiar and local interest, and in the nature of real property, to which it is alone applicable. It is not the creation of a philosophical brain drafting constitutions and forms of government, but the outgrowth of the necessities and varying exigencies of local communities, and hence, like all institutions of similar origin and development, has in-

consistencies and incongruities. Its practical operation, so as to prevent injustice, depends largely upon the good sense and the capacities of the Anglo-Saxon race for the successful working of free government and the management of their private affairs. It combines the public interest with the administration of individual property. Chief Justice Shaw in *Wright v. Boston*, 9 Cush. 233, 241, said the principle of local assessments is "that when certain persons are so placed as to have a common interest among themselves, but in common with the rest of the community, laws may be justly made, providing that, under suitable and equitable regulations, those common interests shall be so managed that those who enjoy the benefits shall equally bear the burden." And the Supreme Court of Maryland in *Baltimore v. Greenmount Cemetery*, 7 Md. 517, spoke of assessments for paving streets as charges on property which are "inseparably incident to its location in regard to other property."

These extracts give the true meaning of local assessments, and furnish the ground upon which they rest and the principle by which they are to be regulated. These assessments, as has been seen, apply only to land, and are a charge on land only. Land is incapable of that absolute and exclusive private dominion accorded to other property. The world's business could not be transacted for a single day without the legal recognition of rights and easements in land, independent of its private ownership. The source of all title to it is the sovereign in whose jurisdiction it exists, and this sovereign has the power to resume title to any portion of it needed for the public use, upon payment of compensation in other property. It is immovably fixed in its location and relations with other land. No one tract, however large, is capable of beneficial enjoyment, without some right or privilege of user in other land. Without such reciprocal rights, each owner of land would be a prisoner in his own home, and the ideal boundaries of separate estates would be insuperable barriers to all human intercourse and progress. There are essential improvements which cannot be made on one tract without affecting another. These relate especially to drainage, protection from inundation, and free passage and

intercourse. These improvements sometimes become of public importance, as well as indispensable to the proper enjoyment of each separate tract. In such cases society has arranged for such management of these common, public, and private interests, as would be just and equitable; and to prevent the burden of such improvements from falling only on the liberal and public-spirited, has provided for its equitable division among those interested. Such a regulation is a local assessment. Towns and cities exist for the more convenient intercourse between their inhabitants and the outside world who resort to them. Without this, there would be no reason for building them. In them, land is principally devoted to three uses, — locations for stores, shops, and factories; dwelling-places for the inhabitants and visitors; and streets, alleys and avenues, over which there may be convenient and free access to all persons, from all points to all other points. Without these, no business could be carried on; the customer and the merchant and manufacturer could not meet; the citizen could not go from his dwelling to his place of business. There is not a day in the year in which nearly every citizen does not use these highways either for business or pleasure. They must permeate every part of the city, and must lead to every man's door. A break or obstruction in any part of one of them would destroy its usefulness and result in the greatest inconvenience. They may be of various qualities, from the common dirt road to expensive pavements of stone or wood. They are essential both to the public at large and to the inhabitants who dwell or do business on them. Each street has thus a public and a local use. In a large city all the streets are rarely if ever used by the same person or by the same local public or neighborhood; hence the injustice of improving any one street at the public expense, unless the municipality should undertake to improve all alike, and in the same year, without reference to the peculiar needs of each locality. Each lot-owner has therefore a general interest in the improvement of all, and a peculiar and special interest in the improvement of the highway on which his property is located. To leave it to the voluntary action of all would result either in no improvement or the imposition of the burden on a few, when

many who derive equal benefits would go free. Hence the necessity for a just and equitable regulation by which each should be compelled to do his share.

It has been seen that in the improvement there is both a general and a local interest. To accomplish the desired result, there must be the conjoint action of those who represent each. The city council may be justly regarded as the representative of the public interest, and may therefore judge of the public necessity for the improvement, and put in operation the public powers necessary to do the work on some equitable plan. But it is not the sole judge, nor does it represent the sole interest to be affected, where the contribution of the local public or sub-district is required. As the representatives of the whole municipality, the council can do the work at the public expense. But is it authorized of its own will to impose the whole expense on the property in the locality improved? In most of the States, notwithstanding the doctrine which prevails that the assessment is no burden, but is remunerated by the enhanced value of the property, it is common to require the assent of the property-holder, on whom it is imposed, or a majority of them. Robertson, C. J., as we have seen, deemed this assent, given either directly or through their representatives, essential. Under our Constitution, where the taking of private property cannot be recompensed by the supposed public benefits to be derived from the appropriation of it, it would seem to be proper that the consent of the owner, or of a majority in a local district established for the improvement, should be obtained. We have seen that the assessment is lawful in virtue of there being a common interest between the property-holders as individuals, and an interest common between them as a locality on the one hand, and the rest of the public on the other, which justifies an equitable rule for the management of these interests. This management cannot be intrusted to one of the parties alone: the interest which justifies it is common, and the management should likewise be common. To give the sole direction and management to the city council would be to intrust them as the representatives of a public upon whom the whole duty might lawfully be devolved, and therefore, having a direct interest to exempt their constituents from a burden by placing



it on others ; it would be making them the sole judges in a matter in which they were directly interested. This should not be done. It would violate the essential principles of a free government ; it would turn over the property-holders to the unrestrained power of a public agency not responsible to them, and accountable only to a constituency who are interested in making the exaction for their own benefit.

Speaking for myself only, I regard it, therefore, as essential to the validity of a local assessment for a public improvement, in the use of which the general public are directly interested, and when the district on which the levy is made is less than any of the regular and legal political subdivisions of the State, that the assent of the local district should be obtained.

Other considerations apply, where the local district, as our levee district, is composed of one or more counties, and entitled therefore to direct representation in the legislature, and where, also, the general public has no user of the improvement. As to the property-owners in such a district, it cannot be said that the principle of taxation without representation has been violated ; but, as to the smaller districts above alluded to, there is no pretence of representation, unless we adopt as valid the argument by which Sir James Mariott undertook to convince the British Parliament that the thirteen Colonies were represented in that body, in virtue of the representation of the County of Kent, of which, by a legal fiction, they were deemed a part. See Cooley Const. Lim. 60, note. But the right to be consulted is stronger in case of an assessment on a locality less than any political division of the State for an improvement in which the public has a direct interest and right of user than in case of the mere levy of a tax pure and simple. The excuse for the imposition is that the improvement is a private benefit to each owner. We have seen that this private benefit cannot, under our Constitution, be treated as a compensation for the money exacted, as it is in other States. It is also certain that no power exists to compel the owner of an estate to improve it for his own private benefit against his own consent. Such an order, issuing from any public authority to an individual would be an act of imperial, autocratic power, not the exercise of any function of a free government. If such

an order cannot be given, as is now universally conceded, to one individual, can it be given to two or three or a dozen, — a number smaller than the State recognizes as a distinct public, having political rights and duties, in any case whatever? Can the legislature create such a local subdivision, with no power of self-defence through representation, and endow it with no capacity whatever, except to be the bearer of a burden imposed on it without its consent? The Supreme Court of New Jersey, in *State v. Newark*, 37 N. J. 415, although recognizing the doctrine that the tax may be compensated by the enhanced value of the land, say, that “when such a burden is sought to be imposed on particular lands, not in themselves constituting a political subdivision of the State, we at once approach the line which is the boundary between acts of taxation and acts of confiscation.” Have we not crossed that line when, without the consent of the owner, we make such an assessment under a constitution which refuses to recognize compensation in the improved value of the land?

It is said that the legislature may impose this burden without the consent of the local district, and therefore may delegate the power to a municipal council. But, if this power of the legislature were conceded, it by no means follows that it may be delegated as claimed. It will not be denied that the legislature cannot delegate the power to one municipality to levy an assessment on another, though such power might be exercised by the legislature itself. The only power of taxation or assessment which the legislature may delegate is a power to a local community to tax itself, not another. For all the purposes of the assessment, the district in which it is laid is as distinct from the municipality in which it is situated as if it were outside of its limits. By the mere act of its creation, it is made separate and distinct from the rest of the municipality. It is not only separate and distinct, but its interest, so far as the assessment is concerned, is antagonistic to the interest of the municipality which assumes to make it. That the distinction may be plainly seen between the case of a local assessment on such a district imposed by the will of another district and our levee system, we have but to imagine that the whole territory included in the levee districts is em-

braced in one county, and that the legislature has empowered the supervisors of that county to build the levee by a tax levied on the general public of the county, or by a local assessment only on the lands exclusively fronting on the Mississippi River, whereby the sole expense of protecting all the lands in the county from inundation may be imposed on a small body of proprietors, created into a taxing district at the discretion of a power interested in relieving its constituents from a great burden, by shifting it on a smaller number, who are incapable of protecting themselves. The Supreme Court of Kentucky said in the case of *Lexington v. McQuillan*, *ubi supra*, that when taxes are levied, "they must be imposed on the public in whose name and for whose benefit they are required, and to whom those who impose to them are responsible," and that the citizen's property is not be taken by the public "without his consent, or an equivalent in money, or in similar contributions by itself." And Judge Cooley, speaking of local taxation under compulsion, and the maxim that taxation and representation should go together, says, that "any reliance upon responsibility to constituents, as a check upon extravagant taxation and reckless misappropriation, becomes useless, and indeed worse than useless, because deceptive, if the constituency in general, instead of bearing the burden of evil legislation, may actually, in some cases, have the general burden diminished by the selection of particular communities for exceptional and invidious taxation. And any principle in representative government may well be considered obsolete when, as applied, it only removes the substantial responsibility and restraining power from the constituency concerned to a distant central authority." Cooley on Taxation, 495.

The above reasoning applies to local assessments, so far as relates to streets, to make a single improvement, which are not of themselves a part of a system which has already been applied or is then applied to the whole municipality, and to such as are exceptional in character and expense as compared with the burdens imposed on the rest of the community. It will be at once perceived that if all the streets in a town are required by the same ordinance to be paved, and that the

property-holders of each street are to pay the cost of paving their own street, the burden is so equalized that we must regard it as but a method of levying a tax on the whole town ; and the same result would follow if a large part of the town had been improved by local assessments on the several streets which had been acquiesced in, and a similar ordinance for repaving the remainder would steer clear of the difficulties we have mentioned. It is only when the State or a municipality selects a part of the streets to be improved in this way, or selects a part to be improved in a manner exceptionally expensive, as compared with the rest of the community, that the persons upon whom the burden is cast should have a right to be consulted. In *Howell v. Bristol*, 8 Bush, 493, the Supreme Court of Kentucky said : " A law imposing taxation on the general public, the evident intent and legitimate result of which are to equalize the burden so far as practicable, will not be held as violative of the fundamental law merely because that desirable end may not be attained. But when, as in this case, the most probable, if not the necessary, consequence of the law is to produce the most oppressive inequality, and to compel a small minority of tax-payers to provide at their sole expense an improvement of general utility and public interest, the construction of which costs more than double as much as the character of such improvements in general use, and from which, when constructed, the general public derives almost as much advantage as themselves, it assumes the character of an attempted exercise of arbitrary power over the property of this minority ; it becomes, in the constitutional sense, a taking and appropriation of their private property to the public use without compensation." This requirement, that the consent of the property-holders of the district, or a majority of them, should in some manner be given to the imposition of the burden, is not found in the adjudged cases, except in the Kentucky case, noted above, nor do my associates concur with me in deeming it essential. It seems to me to result logically from the premises upon which the validity of these assessments must be rested in this State. A determination of the point is not necessary to the decision of the case before us.

We conclude, therefore, that it is now established that these

local assessments are not within the unrestricted discretion of the legislature; that they are subject to many and just limitations which the courts will enforce; and that among them is, that the assessment cannot be imposed on an individual alone, but must be apportioned among a sub-district of several. If this were a local assessment, it would be void for the reasons above stated. The improvement however is the repair of a sidewalk, not of a street; and it seems to be well settled that the paving and repairing of a sidewalk in front of the owner's property may be imposed on him as a police duty. *Burroughs on Taxation*, 494, and cases there cited; *Cooley on Taxation*, 398, and cases cited.

The police power is incapable of exact definition and of a precise limitation. It seems to be a power to which are referred all governmental acts which are incapable of arrangement under any other distinct head, and which are at the same time justifiable, as internal regulations having in view facility of intercourse between citizen and citizen, the preservation of good order, good manners and morals, and the health of the public. When a duty is imposed, under this power, on a property holder, no attention is paid to the fact that its performance will confer any exceptive benefit on his property, as in cases of local assessments. On the contrary, this power justifies the exaction from him of that which will lessen the value of his estate by depriving him of what would, under other circumstances, be a lawful use and enjoyment of his property; as where it prevents his carrying on a lawful business in his house, situated in a crowded district, because such business is, under the peculiar circumstances, a nuisance; and also where it prevents the erection on his property of a house of wood or other inflammable material, as a precaution against fire. Under this power is imposed on the owner of urban property the duty of keeping his grounds and vaults clean, and the removal of all causes for the generation or spread of disease. This power, as to active duties required under it, has usually been confined to acts to be performed on property in the use and occupancy of the party upon whom they are imposed, and such imposition has been on account of such occupancy. The power imposes also a personal duty on account of

the relation which the person from whom the requisition is made bears to the property, with reference to which the duty is to be performed.

In *Goddard, Petitioner*, 16 Pick. 504, Chief Justice Shaw placed the validity of an ordinance of the city of Boston, requiring all occupants of houses abutting on streets to clear the sidewalk in front of their houses from snow within a certain number of hours after it fell, upon these grounds: 1. That the duty was salutary and advantageous in a large city, and was imposed on those who could, with little expense, most easily and promptly perform it. 2. That the selection of these persons to perform this duty was not arbitrary, as it would have been if it had been imposed on the merchants or mechanics of the city, between whose convenience and accommodation and the labor to be performed, there was no natural relation; but the imposition was on those who could easily and conveniently perform it, and who would commonly derive a peculiar benefit from the performance. 3. That the owner of a lot abutting on a street had a peculiar interest in the sidewalk in front of his property; that though it was subjected to a public easement, he had a peculiar use in it, often in accommodating his cellar door and steps, furnishing a passage for fuel, and a passage also from his house to the street. Upon this case most of the subsequent cases are founded, which hold that the duty to pave and keep in repair a sidewalk may under the police power be lawfully imposed on the owner of the abutting property. Regarding such imposition as made under the police power, Mr. Burroughs, in his work on Taxation, p. 494, says, "As a general rule it is believed that in such cases the duty consists either in keeping the walk in repair, or in constructing a footway of plank, or some similar material not very expensive, and not in constructing permanent and expensive pavements."

The police power in such cases, having reference only to the health and convenient intercourse of the citizens and general public, it would seem, ought not to be exerted to impose a burden not necessary to the end proposed. The lot-owner, when ordered to make or repair his sidewalk, it would appear, has fully complied with his duty when he has used such mate-

rial as makes the walk dry as a requisite for health, and smooth and firm for the easy and convenient passage of the public. There would be an exception in cities which have adopted regulations to prevent the spread of fires, as to such parts of them as are within the fire limits. There the requirement of the use of non-inflammable materials can be justified. And there would be a further exception in those cases, now common in large cities, where the lot-owner has extended his cellar under the sidewalk, or so far encroached on it as to bring into operation another part of the police power which makes regulations for the safety of the public. In such cases the municipal authorities would have the power to prescribe such a superstructure over the cellar or other underlying encroachment as would be permanent and strong enough to ensure the safety of the public in using it. In parts of cities and towns where a great number of persons pass, the power would also extend to prevent the use of a material which would occasion a great noise from such constant and crowded use. But this power ought not to be extended beyond the just limits for which it is granted, and should not be made subservient to the imposition of burdens for improvements useful only for the adornment of the public streets.

It must be remembered, however, that sidewalks are also a part of the public streets, and as such may be brought within the principle of local assessments for paving and repairs, just as the carriage-way portions of the streets of which they are a part. And when the municipality chooses to make and repair them in that way, the same considerations, both as to the exaction and the extent of the improvement, apply, as in case of improvements of the carriage-way portion of the streets. It is only when the municipal authorities disregard the principle of local assessments and impose on the owners the duty of paving and keeping in repair the sidewalk in front of their lots respectively, that the police power is exercised. When, however, it is exercised, it ought to be within the limits above stated. It is not necessary to decide whether the municipality may prescribe pavement with brick, as it does not appear but that there were fire limits in the town, and that this pavement was within them. The above views are given as the general

principles which should regulate the exercise of this power, with no intent to decide absolutely that the town council cannot, under any other circumstances than those mentioned, prescribe the material to be used. In this case the repairing was done expressly under the police power. A sidewalk out of repair was declared by an ordinance to be a nuisance, and the town, on the idea contained in *Mayor v. Maberry*, 6 Humph. 368, proceeded to remove the nuisance by making ninety-nine feet of new pavement out of whole brick, on the failure of the owner to repair.

But there is an insuperable objection to maintaining the suit. The right to decide that the sidewalk is out of repair was not vested in the two street committeemen. This question was solely for the determination of the board of mayor and aldermen, and the power to do it could not be delegated by them. *Hydes v. Joyes*, 4 Bush, 464; *Bryan v. Chicago*, 60 Ill. 507. In the last case the point was expressly ruled.

The judgment of the court below, reversing the judgment of the mayor and dismissing the proceeding in which it was rendered, is

*Affirmed.*

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MARY H. HARMON v. W. I. MAGEE.

1. ACKNOWLEDGMENT. *Certificate. When made.*

An officer who has properly exercised the judicial function of taking a married woman's acknowledgment to her deed may perform the clerical act of making the certificate at any time while he remains in office, if third persons' rights do not intervene.

2. MARRIED WOMAN. *Separate estate. Mortgage.*

A married woman's mortgage of her land, in which her husband joins, to secure money paid for taxes thereon, and a surgeon's bill for services to herself, binds the *corpus* of the estate conveyed for the protection of those debts.

3. SAME. *Borrowed money. Representations as to use.*

Money borrowed by her through her husband is not protected by such a mortgage, although he represented to the lender that it was to be used for the purchase of family supplies and necessities, if it was not so used.



4. SAME. *Husband's debt. Chancery pleading. Foreclosure bill.*

While the mortgage will bind the income of the wife's estate if her husband borrowed and used the money, the bill must allege that it is the husband's debt, and a decree subjecting the income is erroneous if both the pleadings and proof show that it is the wife's.

5. MORTGAGE. *Tender of debt. Discharge of security.*

A mere proposition by the mortgagee, in a mortgage executed to secure an usurious debt, to pay the debt if the usury is stricken out, without producing the money, or giving time for calculation, is not such a tender as will stop interest, much less is it sufficiently explicit and formal to discharge the mortgage.

APPEAL from the Chancery Court of Lincoln County.

Hon. THOMAS Y. BERRY, Chancellor.

*H. F. Simrall*, for the appellant.

1. Under the rule established by numerous decisions of this court, no liability attaches to the appellant's separate estate for the money which her husband used in his business. The income is not chargeable because the complainant has failed to allege or prove that the note was signed by the husband, or that the trust-deed was executed to secure his debt. The case is rested in the pleadings and proof upon the ground that the money was loaned to the wife in order that she might purchase necessities. Under a bill like this, filed to subject the *corpus* of the estate, relief by application of the income alone cannot be granted. The appellant is not estopped by her husband's representations that the money was to be used in purchasing family supplies and necessities, unless it was actually so used. It is the use of the advances which creates the charge. *Caldwell v. Hart*, ante, 123. The decree must therefore be reversed.

2. Unless the absolute deed is operative, the case, as to the surgeon's bill and taxes, must also fail. The method of conveying real estate by married women, prescribed in Code 1871, § 2315, which is a substitute for the common-law fine and recovery, must, according to all the authorities, be closely followed, and a deed delivered without any certificate of acknowledgment is void. *Johnston v. Wallace*, 53 Miss. 331. A defective certificate of acknowledgment to the deed of a *feme covert* cannot be amended. *Willis v. Gattman*, 53 Miss.

721. The safety and integrity of titles absolutely demands that justices of the peace shall not be permitted months or years after instruments have passed out of their hands to make writings on them, drawn from their memories, which shall have effect as judicial acts. This deed was a nullity, and the title could not pass except by a new acknowledgment and delivery, or by a new deed properly acknowledged and certified.

*R. H. Thompson*, on the same side.

1. The tender refused by the mortgagor destroyed the mortgage, for, as said by an ancient writer, "it shall be accounted his own folly that he refused the money when a lawful tender of it was made unto him." Co. Lit. §§ 335, 338. He adds, "that in all cases of condition for payment of a certaine summe in grosse, touching lands or tenements, if lawful tender be once refused, he which ought to tender the money is of this quit and fully discharged forever afterwards." The doctrine is also announced in the following authorities: 9 Bacon Abr. tit. Tender; *Kortright v. Cady*, 21 N. Y. 343; 4 Wait's Actions and Defences, 544; *Columbian Building Association v. Crump*, 42 Md. 192; *Potts v. Plaisted*, 30 Mich. 149; 4 Kent Com. 193, note; *Farmers' Ins. Co. v. Edwards*, 26 Wend. 541; *Jackson v. Crafts*, 18 Johns. 110; *Arnot v. Post*, 6 Hill, 65; Coote on Mortgages, 6; *Tiffany v. St. John*, 65 N. Y. 314; *Winter v. Coit*, 7 N. Y. 288; Com. Dig., tit. Mortgage "A"; Buller's Nisi Prius, 72; *Boardman v. Sill*, 1 Camp. 410, note; *Weeks v. Goode*, 6 C. B. N. S. 367; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Ratcliff v. Davis*, Yelv. 178; *Six Carpenters' Case*, 8 Coke, 146 a; *Pilkington's Case*, 5 Coke, 76.

2. The married woman had no right to borrow money. Her note is void, and the deed of trust, which is but an incident to the debt, is void also. *Viser v. Scruggs*, 49 Miss. 705. The money was used by her husband, but it was wrong to subject her income, for the complainant failed to establish the fact that it was the husband's debt. This court will not sanction the evident misconception of the law, which met the Chancellor's approval. *Schumpert v. Dillard*, 55 Miss. 348. The doctor's bill constituted no charge on the land. The only repairs for which a married woman can contract, under the statute (Code 1871, § 1780), are those on her property.

3. The deed is void for want of a certificate of acknowledgment, in accordance with Code 1871, § 2315. Neither the married woman nor the officer can impeach an acknowledgment. *Stone v. Montgomery*, 35 Miss. 83; *Johnston v. Wallace*, 53 Miss. 331. Nor can a defective certificate be supplied by parol. *Willis v. Gattman*, 53 Miss. 721. The officer cannot, ten months after the signing and delivery of the deed, affix a valid certificate of the acknowledgment taken by him at the date of the deed. The magistrate, who acts judicially, has lost jurisdiction of the parties and subject-matter. *Jamison v. Jamison*, 3 Whart. 457; *Heeter v. Glasgow*, 79 Penn. St. 79; *Jourdan v. Jourdan*, 9 S. & R. 268; *Barnet v. Barnet*, 15 S. & R. 72; *Watson v. Bailey*, 1 Binney, 470; *Ennor v. Thompson*, 46 Ill. 214; *Lickmon v. Harding*, 65 Ill. 505; *Harty v. Ladd*, 3 Oregon, 353; *Carpenter v. Dexter*, 8 Wall. 513; Whart. Evid. §§ 1052, 1053. If he can do so, a matter required to be in writing will rest in parol.

*Sessions & Cassidy*, for the appellee.

The deed of trust is effectual to secure the money borrowed. If the debt is that of the wife, and such as she could contract, it subjects the *corpus* of the estate, and, if the husband's, it binds the income. The bill avers that the money was for Mrs. Harmon, to be expended for necessaries. As she and her husband fraudulently misled Magee, so that he repeated their assurances to him by the allegations of his bill, they should not now be permitted to object to the relief granted because of mistaken allegations instigated by them, but corrected by the proof. Without the absolute deed, the wife's separate estate is liable for the taxes and physician's bill. She can buy bread or an antidote for poison. They are "necessaries." Why then can she not pay for a surgical operation which saves her life? The taxes are a lien by statute. The deed is, however, valid. The certificate of acknowledgment is only the written evidence of the officer's act, which he is authorized to make without limitation as to the time when he shall do so. It is unnecessary to discuss the effect upon the mortgage of a tender of the debt, because there was none in this case. No money was produced, nor was the sum due ascertained, or time allowed for calculation.

CHALMERS, J., delivered the opinion of the court.

Mrs. Harmon, through her husband, borrowed of Magee one hundred and fifty dollars and executed a note for one hundred and ninety dollars, the excess consisting of usury embodied in the face of the note. Whether the note was signed by the husband does not appear, but both husband and wife joined in a mortgage upon the wife's realty to secure it. The husband represented to the lender that the money was intended for the purchase of family supplies and necessaries, but it was used if not borrowed by him for his own business. Magee subsequently paid taxes on the property to the amount of forty or fifty dollars, and loaned to Mrs. Harmon the further sum of fifty dollars to pay a surgeon for performing an operation upon her person. At the date of the last advance, Mr. and Mrs. Harmon executed to him a deed to the property absolute upon its face, and received from him a defeasance, by which he obligated himself to reconvey to them upon payment, by a day named, of the whole amount due him. The deed was in all respects properly executed and acknowledged, save that the officer taking the acknowledgment failed, at the time, to sign the certificate that the wife had acknowledged it, though the certificate was written out and appended. It was nevertheless recorded, and ten months afterwards the officer, discovering his omission, informed Mrs. Harmon of the fact, and, upon her admission then that she had appeared before him and acknowledged it ten months previously, appended an additional certificate to that effect. No rights of third parties had intervened. No portion of the money due having been paid, this bill is filed to enforce payment by a subjection of the property conveyed. The defence is rested upon several grounds. It is argued that, as to the first mortgage, it imposes no liability upon the wife or her property, because it was neither given to secure a valid debt of her own, nor any debt whatever of the husband's. The debt secured by it was not binding upon her, it is insisted, because it was not contracted for any of the purposes for which by statute she can bind the *corpus* of her estate, and it did not bind her income, because it is not alleged or proved that the husband signed the note, and thereby made it his

debt. The absolute deed (evidently intended to operate as a mortgage) is said to be invalid, because of the failure of the justice to append his signature to the certificate of acknowledgment at the time when the acknowledgment was made.

Addressing ourselves to a consideration of the last proposition, we cannot give it our sanction. The acknowledgment of a married woman is an essential part of a conveyance executed by her. If wanting, it cannot be supplied; if defective, it cannot be amended; and, if properly authenticated, it cannot be gainsaid nor questioned, save for fraud. *Johnston v. Wallace*, 53 Miss. 381; *Willis v. Gattman*, 53 Miss. 721; *Allen v. Lenoir*, 53 Miss. 821. The officer who takes it performs a judicial act in determining whether it was acknowledged in the mode and manner required by law; and he is required by his certificate to authenticate the judicial conclusion to which he has arrived. This certificate he must sign; and, if he fails to do so, the instrument cannot be recorded, or, if recorded, will not constitute notice to third persons. But there is no requirement in the statute that the certificate shall be made, much less signed, in the presence of the woman. We apprehend that in practice it frequently, if not usually, happens that the certificate is written out and signed after she has retired. If an hour elapses, or a day, is the instrument thereby avoided? We think not. The judicial act has been performed when she has made and the officer has received her separate acknowledgment. The memorial of it, the making-up of the record, so to speak, which follows afterwards, is a ministerial or clerical act, and, where the rights of third persons have not intervened, may be done at any time while the officer remains in office. We conclude, therefore, that the second mortgage (the absolute deed) was properly executed by the wife, and that it protects all the valid debts due by her. This was the view taken by the Chancellor, and he decreed that the *corpus* of her estate was bound for the taxes paid and the money loaned to pay the surgeon, and, treating the first loan of one hundred and fifty dollars as a debt of the husband, for which the wife had pledged her separate estate, he held that it bound the income of the property. We approve his ruling as to the taxes and the sur-

geon's bill, but with reference to the one hundred and fifty dollar loan this serious difficulty is presented:—The complainant distinctly charges in his bill that the money was loaned solely and exclusively to the wife upon the faith of her separate property, and for the purchase of family supplies, while the proof shows that, whatever may have been the original object in obtaining the money, it was in fact used by the husband in his business.

It is settled law in this State that the contract of a married woman for borrowed money is void, and that the lender can only recover against her by a species of subrogation; namely, by showing that his money was in fact used in the purchase of some of those things for which she is by law authorized to contract, and therefore he should be substituted to the rights of those who furnish them. It was held in *Wright v. Walton*, 56 Miss. 1, that, even though the lender had been induced to part with his money by assurances that it would be thus used, a recovery would be defeated, if a different application of it was in fact made. In this case the complainant, misled by the assurances given him, rested his case, both in his pleading and proofs, solely upon the allegation that it was the debt of the wife for which the *corpus* of her estate was liable. He neither avers that the husband signed the note with her, nor does he produce the note itself. If, in fact, the husband signed it, he thereby made it his debt, and the mortgage by the wife would bind the income of the property, as held in *Reed v. Coleman*, 51 Miss. 835. It was not even essential in this case that he should have signed the note, for the circumstances of his obtaining and using the money made it his debt, and it was competent for the wife to bind the income of her property for it, whether due by note or open account. But the complainant, having in his pleading averred the debt to be solely that of the wife, and having failed, by a production of the note, to show a liability upon the part of the husband, cannot, without amendment, be allowed to recover upon a different theory. The decree will be reversed and cause remanded, with leave to the complainant to amend as he may be advised.

Lastly it is urged by the defendant that, before the bringing

of this suit, she tendered the full amount due by her, and that, while this does not acquit her of the personal obligation, it does discharge and vacate the mortgage upon her property. It has been settled from the earliest times that a perfect and technical legal tender will discharge all mortgages, pawns, pledges, and collateral securities, though the personal obligation to pay the debt remains, and it has been held that it will have this effect though not continuous, nor brought into court with the plea. The ancient and perhaps the general rule is, that, in order to have this effect, it must be made upon the very day that the debt becomes due, known in this connection as the law-day. The Court of Appeals of New York, in the case of *Kortright v. Cady*, 21 N. Y. 343, ruled by a divided bench that it was immaterial upon what day the tender took place, and that its effect was to discharge the security. The question is elaborately discussed in the several opinions, and the doctrine traced from the earliest times. It was well said by the Supreme Court of Michigan, in *Potts v. Plaisted*, 30 Mich. 149, that in view of the serious consequences to the creditor of a doctrine that must often result in the absolute destruction of the debt, and in view of the strong temptation which must exist to make, or at least to prove, sham tenders, the evidence on the subject "should be so full, clear and satisfactory, as to leave no reasonable doubt that the tender was so made that the holder must have understood it at the time to be a present, absolute and unconditional tender, intended to be in full payment and extinguishment of the mortgage, and not dependent upon his first executing a receipt or discharge, or any other contingency. And the holder must, in every case, have a reasonable opportunity to look over the mortgage and accompanying papers, to calculate and ascertain the amount due, and, if such papers are not present, he must be allowed a reasonable time to get them and make the calculation." The pretended tender in the case at bar fulfilled none of the requirements here laid down. Indeed it was in no proper sense a tender at all. It was a mere proposition or offer by Mrs. Harmon's attorney to pay what was due, if all usurious interest was stricken from the mortgage. No money was produced, nor is it shown that any was present. It was not pro-

posed to pay it then and there, nor was any thing said as to when it would be paid. None of the papers were at hand, nor was any thing said about procuring them or giving time for calculation. The offer did not amount to such a tender as would stop interest, much less to one sufficiently explicit and formal to discharge the mortgage.

*Decree reversed and cause remanded.*

57 418  
71 523

### J. R. COTTEN v. H. H. MCKENZIE.

**1. PROMISSORY NOTE. Considerations. Illegality of one of several.**

A promissory note given for goods and spirituous liquors sold by a licensed vendor in less quantities than one gallon, being, under Code 1871, § 2464, for an illegal consideration as to the liquor, is void in whole. CHALMERS, J., doubted.

**2. SAME. Action for the legal debts. Not affected by illegal note.**

The invalidity of the note does not, however, affect the payee's right to recover the price of the goods, in an action properly instituted for that purpose, and under appropriate pleadings.

**3. CONTRACT. Several considerations. Illegality. Insufficiency.**

A distinction exists between want or insufficiency of consideration and illegality. An entire contract based on several considerations will be upheld if one is sufficient, although the others are insufficient, but if one of them is illegal, the whole contract is void.

**ERROR to the Circuit Court of Pike County.**

Hon. J. B. CHRISMAN, Judge.

This suit was upon the promissory note of the plaintiff in error to the defendant in error, on which judgment was rendered in favor of the latter. The consideration of the note was a running account including family supplies and various items of vinous and spirituous liquors, in less quantities than one gallon, sold on credit to the former by the latter, who was licensed to sell such liquors at retail. The court charged the jury to find for the plaintiff the amount of the note less the sum due for the liquors.

*Cassedy & Stockdale*, for the plaintiff in error.

The public policy embodied in Code 1857, p. 199, art. 13 ;



Code 1871, § 2464, is against the sale at retail of intoxicating drinks on a credit, and the penalty attached to its violation affects the cupidity which induces the traffic. A provision in a statute declaring that the doing of an act shall be visited by a prescribed penalty is equivalent to an announcement that such act shall be illegal. *Gregory v. Wilson*, 36 N. J. 315. The consideration being illegal in part, the note is void *in toto*. *Widoe v. Webb*, 20 Ohio St. 431; *Bank of Newberry v. Stegall*, 41 Miss. 142.

*J. C. Lamkin*, for the defendant in error.

The laws of Ohio and New Jersey prohibit the sale of liquors and make the act a crime, while in this State the sale is lawful, but, by the statute, the seller may lose the debt. The cases cited by opposing counsel are, therefore, inapplicable to this case, which is not one in which the consideration for the note is illegal. Part of the consideration for the note was valid, the other part was not illegal, but void. The concurrent doctrine of the text-books on the law of contracts is, that if one of two considerations be void merely, the other will support the promise. *Widoe v. Webb*, 20 Ohio St. 431.

CAMPBELL, J., delivered the opinion of the court.

The doctrine deducible from the multitude of authorities, which we have examined, as applicable to the main question in this case, is that if a contract is based on several considerations, some of which are merely *insufficient* and not *illegal*, it is not void, but may be upheld by the consideration which is sufficient; but that, if one of several considerations of an entire contract, as a note is, be *illegal*, the whole contract is void. 1 Parsons on Contracts, 455, 457; Metcalf on Contracts, 216, 246; 1 Daniel Neg. Inst. § 204; 1 Parsons on Notes and Bills, 217; 1 Chitty Pl. 295; *Widoe v. Webb*, 20 Ohio St. 431, and authorities cited; *Featherston v. Hutchinson*, Cro. Eliz. 199; *Shackell v. Rosier*, 2 Bing. N. C. 634; *Scott v. Gilmore*, 3 Taunt. 226; *Bradburne v. Bradburne*, Cro. Eliz. 149; *Coulston v. Carr*, Cro. Eliz. 847; *Crisp v. Gamel*, Cro. Jam. 128; *Robinson v. Bland*, 2 Burr. 1077; *Jones v. Waite*, 5 Bing. N. C. 341; *King v. Sears*, 2 Crompt. M. & R. 48; *Deering v. Chapman*, 22 Maine, 488; *Donallen v. Lennox*, 6 Dana, 89;

*Brown v. Langford*, 3 Bibb, 497; *Collins v. Merrell*, 2 Met. (Ky.) 163; *Saratoga Bank v. King*, 44 N. Y. 87; *Pettit v. Pettit*, 32 Ala. 288; *Wynne v. Whisenant*, 37 Ala. 46; *Clark v. Ricker*, 14 N. H. 44; *Carleton v. Whitchee*, 5 N. H. 196; *Hinds v. Chamberlin*, 6 N. H. 225; *Barton v. Port Jackson Plank Road Co.*, 17 Barb. 397; *Woodruff v. Hinman*, 11 Vt. 592; *Valentine v. Stewart*, 15 Cal. 387; *Bliss v. Negus*, 8 Mass. 46; *Kimbrough v. Lane*, 11 Bush, 556; *Bixby v. Moor*, 51 N. H. 402; *Carleton v. Woods*, 28 N. H. 290; *Collins v. Blantern*, 1 Smith's Lead. Cas. 489; *Warren v. Chapman*, 105 Mass. 87; *Crawford v. Morrell*, 8 Johns. 253.

In *Coulter v. Robertson*, 14 S. & M. 18, the court said, "The distinction between a mere failure or want of consideration and its illegality is obvious. The principle which recognizes the distinction is founded in public policy." In *Shackell v. Rosier*, 2 Bing. N. C. 634, Tindal, C. J., said, "When a promise rests on two considerations, one of which is impossible or unintelligible, you may reject the impossible or unintelligible, and resort to that which is possible and plain. But all the books take a distinction as to the case where part of the consideration is illegal." In *Collins v. Blantern*, 1 Smith's Lead. Cas. 502, it is said, "Though the illegality of one of the considerations vitiates the contract, yet it is otherwise, if one or more of them be merely void or nugatory, as, for instance, a promise by a man to pay his own just debts; for then the void consideration is a nullity, and the others which remain support the contract."

This distinction will be found to pervade the adjudged cases and the text-books on this subject. The question is, What renders a consideration *illegal* in a sense which will annul a contract resting partly upon it? Upon this question the books do not furnish a clear light, and we are driven to the necessity of gathering their scattered rays. In *Bradburne v. Bradburne*, Cro. Eliz. 149, the court held that, "where there are divers considerations alleged by the plaintiff, and some are *frivolous and void*, yet if any of them be good, the plaintiff shall recover," and in *Coulston v. Carr*, Id. 847, it was "agreed that, if two or three considerations be alleged in a declaration, and there be one of them sufficient, although the others be

insufficient, in matter or form, yet the one being sufficient, it is well enough." In *Crisp v. Gamel*, Cro. Jam. 128, it was resolved, "That where, in an assumpsit, two considerations be alleged, the one good and sufficient, and the other *idle* and *vain*, if that which is good be proved, it sufficeth." In *Featherston v. Hutchinson*, *ubi supra*, a distinction was taken between the *illegality* and the mere *insufficiency* of one of two considerations. In *Robinson v. Bland*, *ubi supra*, the bill of exchange sued on was held to be void, because it was given partly for an *illegal* consideration, *i.e.*, money won at play, and a recovery was had on the count for money lent, that being the other consideration of the bill of exchange. A recovery on the writing was denied, because of the illegality of part of the consideration on which it was given, but the illegality of the *security* was held not to affect the claim for so much of the amount included in it as would have been recoverable, if the bill of exchange had not been executed. In *Scott v. Gillmore*, *ubi supra*, the bill of exchange sued on was given to the keeper of a coffee-house, in payment of a debt, part of which was for spirits furnished by the payee in small quantities, not amounting to twenty shillings, at one time, when the Stat. 24 Geo. II, c. 40, § 12, declared that no one should maintain an action for the price of spirits furnished in such small quantities. It did not declare, in terms, that any security for such price should be void. It was held, that the consideration was illegal, and the whole bill of exchange was void, because given for this illegal consideration in part. In *King v. Sears*, *ubi supra*, one of the considerations was rejected as surplusage, because it was insufficient, *i. e.*, was no consideration. In *Deering v. Chapman*, *ubi supra*, the illegality of one of the considerations, which rendered the note void, was a sale of liquor in violation of statute. In *Carleton v. Whitcher*, *Hinde v. Chamberlin*, *Brown v. Langford*, *Kimbrough v. Lane*, *Saratoga Bank v. King*, *Bliss v. Negus*, *Woodruff v. Hinman*, *Valentine v. Stewart*, and other cases cited above, the illegality of some of the considerations consisted in their being either against good morals or in contravention of public policy, as fixed by common law or some statute. "If any part, however small, of the entire consideration of a contract be vicious,

the whole contract is void " is language used in the opinion of the court in *Kimbrough v. Lane*, *ubi supra*. Similar language is found in the opinion in *Brown v. Langford*, cited above. " Contracts are illegal, when founded on a consideration *contra bonos mores*, or against the principles of sound policy, or founded in fraud or in contravention of the positive provisions of some statute." 2 Kent Com. 466. Illegality may consist in the violation of some positive statute or in the violation of the laws of religion, morality, or decency, or in opposition to public policy. 1 Parsons on Notes and Bills, 213, *et seq.*

The case of *Yundt v. Roberts*, 5 Serg. & R. 139, is in direct conflict with *Scott v. Gillmore*, 3 Taunt. 226, cited above, and upon a similar state of facts and law, but while disregarding the rule announced in the latter case, the opinion contains a distinct recognition of it, as being correct. In *Yundt v. Roberts*, there was a failure to observe the distinction between the *security*, which was illegal, on the principle, announced by the court, and the several debts, to evidence which it was given. In the opinion it is said, " If a statute declares any security taken for a matter prohibited shall be void, and an action is brought on a security taken for that which is unlawful, but is blended with that which is lawful, the whole security is void, because the letter of the statute makes it void, and is a strict law." There were five notes sued on, and it was admissible to refer the lawful consideration to such of the notes as together did not exceed its amount, and uphold them, upon the principle announced in *Warren v. Chapman*, 105 Mass. 87. The notes were separable, and on that view the case is reconcilable with the authorities generally. But in any other view, it is opposed to them, and is unsatisfactory. In *Barton v. Port Jackson Plank Road Co.*, *ubi supra*, the consideration, which was held to make void the whole contract, was within the prohibition of a statute, which simply prohibited the thing, and did not make it void in terms, or impose a penalty. So in *Scott v. Gillmore*, cited above, the statute did not, in terms, avoid the security, but it was held that the security was illegal. In *Collins v. Merrell*, 2 Met. (Ky.) 163, the note was partly for money lent, for the purpose of gaming. The statute declared such contract void, and the whole note was held to be void.

There is some confusion among the reported cases, bearing on this question, arising from a failure to observe the distinction between want or failure of consideration, and illegality of part of the considerations of a contract. *Frazier v. Thompson*, 2 Watts & Serg. 235, is a striking example of this class of cases. It involved a question of want or failure of consideration, as to part of the sum for which the note sued on was given, and strangely enough *Yundt v. Roberts*, cited above, was referred to in support of the availability of the defence of partial want or failure of consideration. *Hynds v. Hays*, 25 Ind. 31, if not to be considered as dealing with partial want or failure of consideration, must be pronounced to be opposed to the current of English and American authorities. The distinction is between mere insufficiency or no consideration, and that which the common law or a statute denounces as not a lawful one; between what is *vain* or *idle* or *frivolous*, and what is *vicious*, as indicated by the common law or a statute; between what the law regards as no consideration, and what it will not permit to serve as such, because of its vicious qualities.

But while recovery cannot be had on the *security* thus infected, a recovery may be had, under proper pleadings, on so much of the consideration for which the note was given, as without it was recoverable. The illegal note has no effect on the valid dues embraced in it. They are as if the note had not been given. 1 Parsons on Notes and Bills, 217; 1 Daniel on Neg. Inst. § 204; *Robinson v. Bland*, 2 Burr. 1077; *Carleton v. Woods*, 28 N. H. 290. The note sued on in this action was given in liquidation of open accounts for goods sold by the payee to the maker. The payee was a licensed retailer of vinous and spirituous liquors. Among these accounts were many items for vinous or spirituous liquors sold in less quantities than a gallon, on credit. The statute declares that if any person licensed to retail vinous and spirituous liquors "shall trust or give credit to any person, for vinous or spirituous liquors, sold in less quantities than a gallon, he shall lose the debt, and be for ever disabled from recovering the same, or any part thereof; and all notes or securities given therefor, under whatever pretence, shall be

void." Code of 1857, p. 199, art. 13 ; Code of 1871, § 2464. To the extent that the note was given for the vinous or spirituous liquors sold on trust or credit, the statute makes it void ; and being thereby rendered illegal, in part, it is void in whole, and cannot be enforced. The invalidity of the note did not affect what the payee had the right to recover without the note. But the only question now presented is the right to recover on the note, and that we answer in the negative.

*Judgment reversed and cause remanded for a new trial.*

CHALMERS, J., delivered the following opinion.

I cannot say that I dissent from the foregoing opinion, and yet I can hardly say that I am satisfied of its correctness. If the selling of liquors by a licensed retailer on a credit was made unlawful or prohibited by statute, the result reached would undoubtedly be correct, because in such case the illegal consideration embodied in the note would so vitiate it as to render a recovery even of the valid portion impossible, but the statute does not prohibit the selling of liquor on a credit, nor make it unlawful. It simply declares that the price shall not be recoverable by law, and that all securities given for it shall be void, meaning thereby, as I am inclined to think, that they shall be treated as without consideration and on that account void. A note given for a consideration partly good and partly nugatory is recoverable to the extent of the good consideration, if the two can be separated, and such, it would seem, should be the determination of this case, but the weight of authority elsewhere is so heavy and the convictions of my colleagues so strong that I content myself with throwing out this expression of my doubts. Those doubts are so serious that I cannot do less.

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### ISAAC BROWN v. THE STATE.

#### 1. JURORS. Competency. Opinion. Bias.

No person is a competent juror who has a settled opinion as to the existence of a fact, so connected and usually associated with the main fact in issue that it is difficult to disbelieve the coexistence of the latter.

2. **JURORS.** *Householder. What constitutes.*

The fact that a juror has a rented store in which he sleeps does not constitute him a householder, within the meaning of the statute (Code, 1871, § 724) prescribing the qualifications necessary to sit on juries. *Nelson v. State*, ante, 286, cited.

3. **SAME.** *Challenge. Curing error.*

The erroneous overruling of a challenge for cause, if the prisoner afterwards peremptorily challenges the juror, is no ground for reversal, unless prejudice is shown; as, for instance, by the exhausting of the peremptory challenges before the panel is complete.

4. **SAME.** *Incompetency. When ground for new trial.*

If, however, the prisoner does not exercise his right of peremptory challenge, and the incompetent juror, under the erroneous ruling, is sworn and acts on the jury, the prisoner's legal rights are invaded, and the verdict will be set aside.

5. **PERJURY.** *Witness. Juror. Competency. Opinion.*

In a prosecution for perjury, committed by swearing to an *alibi* in an arson case, a juror who has formed an opinion as to the guilt or innocence of the person tried for arson is incompetent, although he has formed or expressed none as to the person charged with perjury.

6. **SAME.** *Evidence. Relevancy.*

If the charge is falsely swearing that the person tried for arson was at the witness's house from half-past seven on the night before the fire until four o'clock in the morning when it occurred, it is material to prove that he was in a store near the scene of the fire until midnight.

7. **SAME.** *Competency. Hearsay.*

Declarations of the person accused of arson, made before his trial, and tending to show his guilt, and therefore contradictory of the *alibi*, are incompetent as evidence in the prosecution for perjury, unless the defendant in that case was present when they were made.

8. **SAME.** *Indictment. Knowledge of falsity of oath.*

The averment in an indictment for perjury that the accused knew that the statement was false is necessary only when the oath was as to the witness's belief; and, if it was absolute, the averment is surplusage, and the indictment should be construed as if it was omitted.

9. **SAME.** *Wilfully and corruptly false. Mistake and inadvertence.*

It must be shown that the oath was wilfully false, and if its falsity resulted from mistake or inadvertence, there is no perjury; but it is unnecessary for an instruction requiring it to be wilfully false to state that it must be corruptly so, since the former implies the latter.

10. **SAME.** *Rule as to two witnesses. Instructions.*

The jury should be informed, in some part of the instructions in a trial for perjury, that, before they can convict, the fact that the oath was false must be shown to their satisfaction by the testimony of two witnesses, or by one witness and corroborating circumstances.

11. PERJURY. *Indictment. Averment. Certainty.*

An indictment for perjury is sufficient, under Code 1871, § 2667, although it fails to set out, with the highest degree of certainty, the county in which the indictment was found on the trial whereof the false testimony was given, or the plea which was filed in that case.

ERROR to the Circuit Court of Lincoln County.

Hon. J. B. CHRISMAN, Judge.

The indictment in this case, which, as stated on its face, was found by the grand jurors of Lincoln County, Mississippi, impanelled in the Circuit Court of said county, charged the plaintiff in error, in the manner prescribed by Code 1871, § 2667, with perjury, committed on the trial of the case of *The State v. Samuel Williams* at a former term of the Circuit Court of said county, in a matter material to the issue which was then being tried by a jury, before Hon. J. B. Chrisman, judge of said court.

A. C. McNair, for the plaintiff in error.

1. The court erred in regard to the juror, W. C. Mason, who had a fixed opinion concerning Williams's guilt. In order to secure to the prisoner a trial by an impartial jury, which is the policy of the law, it is essential that the jurors' minds should be entirely neutral, and free from all knowledge of the question to be tried. Williams's guilt was so blended with that of the prisoner that it was impossible to believe one without the other, especially as the State introduced in this case the testimony on which Williams was convicted. If a juror has formed an opinion as to a leading or controlling fact in the issue to be tried, he is disqualified. 1 Burr's Trial, 417. If the jury believed Williams guilty, the prisoner's guilt, in this case, followed almost as a natural consequence.

2. The juror Krause should also have been rejected. Jurors must be householders. Code 1871, § 724. A householder is a master or chief of a family; one who keeps house with his family. *Woodward v. Murray*, 18 Johns. 400. He is a person having and providing for a household. *Griffin v. Sutherland*, 14 Barb. 456; Bouvier's Law Dic. 673; *Bowne v. Witt*, 19 Wend. 475. No one is a householder who is not the head of a family. Whenever you take away the idea of family, you destroy the meaning of the term. Construed



in this light, Krause, who was an unmarried man without a family, was not within the statutory rule. The fact that he slept in his rented store did not make him a householder.

3. The court also erred in its action on objections to the evidence. The material question on the trial of the arson case was the whereabouts of Williams when the fire took place, not where he was on the night before. And, in the case at bar, it was only calculated to confuse the jury, and withdraw their minds from the issue, when evidence showing his locality hours previously was admitted. The declarations made by Williams showing his guilt, while admissible at the trial for arson, were clearly incompetent as against the plaintiff in error. Even if the two persons had been jointly indicted, admissions of guilt by one in the other's absence would have been incompetent against the latter. The threats were not made in presence of the plaintiff in error, nor with reference to the offence with which he is charged.

4. The indictment charged that the defendant knew that his testimony was false, and the issue presented was his knowledge of the fact; yet the court charged the jury to convict if he testified to the facts, without knowing whether they were true or false. Under this indictment he could not be convicted, unless he knew that the statements were false when he made them. *Norris v. State*, 83 Miss. 373. The first charge should also have stated that the testimony must be wilful and corrupt. Under this instruction, the prisoner, although he believed the facts to which he swore, or spoke from inadvertence without any evil intent, would be convicted. Code 1871, § 2660; *Cothran v. State*, 39 Miss. 541.

5. The instructions should have informed the jury that, before they could convict the prisoner, the charge must be affirmatively proved by two witnesses, or one witness and corroborating circumstances; and the failure to do this is error. *State v. Heed*, 57 Mo. 252. Two witnesses are necessary to prove the falsity of the prisoner's former testimony. Hawk. P. C. b. 2, c. 46, § 6; 2 Starkie Evid. 626; *Champney's Case* 2 Lewin, C. C. 258; *Regina v. Yates*, Car. & M. 132. The testimony of a single witness is insufficient to convict on a charge of perjury. 4 Black. Com. 358; Roscoe's Crim. Evid.

765 ; 1 Greenl. Evid. §§ 257, 258 ; *United States v. Wood*, 14 Peters, 430.

6. The motion in arrest of judgment should have been sustained, because this indictment failed to show the county in which the indictment against Williams was found, and also because it did not show his plea or traverse in that case with sufficient certainty. It is essential that these facts should be plainly set forth. Judgment on an indictment defective in those particulars must be arrested. 2 Wharton Crim. Law, § 2248 ; *State v. Gallimore*, 2 Ired. 372.

*T. C. Catchings*, Attorney General, for the State.

1. Even if the juror Mason was incompetent, the plaintiff in error, who could have protected himself and failed to do so, cannot complain. After his challenge for cause had been disallowed, he should have challenged peremptorily. If, in such case, he had exhausted his peremptory challenges before the jury was completed, he would be entitled to a reversal. But if, after the panel was complete, he had not exhausted his peremptory challenges, or if the record is silent on the subject, as in this case, he has not made it appear that he was injured by the ruling of the court. The juror was, however, competent. It does not follow that, because he had an opinion as to the guilt or innocence of Williams, he also had one as to the accused. The former might have been guilty and the latter innocent. To make the plaintiff in error guilty, he must have sworn wilfully and corruptly that Williams was with him on the night of the fire. The question was not so much whether Williams was with the accused, as whether the latter so made oath wilfully and corruptly. Hence the opinion which Mason entertained as to Williams's guilt or innocence in no way prevented his being an impartial juror in the trial of Brown. While Krause was not a householder, and was therefore incompetent, the plaintiff in error cannot complain of his admission to the jury-box, for the same reason that he cannot complain as to Mason ; that is to say, he does not show that he used every means provided by law to protect himself against this juror.

2. The evidence as to Williams's whereabouts on the night before the fire was relevant, as contradicting the testimony of the accused on the arson trial, that Williams and

himself remained together from 7.30 o'clock that night until the fire occurred next morning. The declarations and threats of Williams, as deposed to by a number of witnesses, were properly admitted. They tended to connect Williams with the burning. If Williams did the burning, Brown's statement that Williams was with him was not true. The evidence was introduced as tending to show that Brown's testimony was false, and was, therefore, relevant.

3. The objection to the instruction is not well taken. The words "knew to be false" are mere surplusage, in no manner a part of the description of the offence, and consequently may be rejected. Under either the common law or our statute, those words are wholly unnecessary, and, if they were omitted from the indictment, it would still contain a valid charge of perjury. 2 Wharton Crim. Law, § 2198; Code 1871, § 2660; 2 Wharton Precedents, 577. The charge that the defendant knew the matters testified about to be false is required only where he has sworn to his belief. 2 Wharton Crim. Law, § 2261. Nor did the instruction require the jury to convict the prisoner, although they might have believed that he honestly supposed he was telling the truth. On the contrary, they were told that it must appear that the testimony was wilfully false or given by the defendant when he did not know whether it was true or false.

4. The rule requiring two witnesses or one witness and corroborating circumstances was adopted, because otherwise there would be nothing more than the oath of one man against another. 1 Greenl. Evid. § 257. That rule, therefore, can have no application where the evidence is circumstantial. Perjury may be established without any direct testimony whatever as to the falsity of the oath, which may be shown by circumstances. The motion in arrest of judgment was properly overruled; for, under Code 1871, §§, 2660, 2667, the averments stated to be not clearly made need not be made at all.

GEORGE, C. J., delivered the opinion of the court.

The plaintiff in error was indicted for perjury, charged to have been committed on the trial of an indictment for arson against one Samuel Williams. The testimony charged to be false was

to the effect that said Samuel Williams was at the house of said Brown at 7.30 o'clock on the night preceding the burning, then went to bed with Brown, and slept with him till the next morning at 4 o'clock, when they were awakened by an alarm given of the fire. The effect of this evidence would be to show the innocence of Williams by establishing an *alibi*. The plaintiff in error was convicted, and sentenced to the penitentiary for ten years, and from this judgment he sues out this writ of error. He has made several assignments of error in this court, most of which it will be necessary to notice in order to lay down the proper rules for the guidance of the court below in conducting the new trial, which we have decided to grant.

When the jury was being impanelled, W. C. Mason was examined by the court touching his qualifications as a juror, and on such examination stated that he had not formed or expressed any opinion as to the guilt or innocence of the prisoner, but had formed a decided and fixed opinion as to the guilt or innocence of Williams, on whose trial for arson the perjury was charged to have been committed by the prisoner. When this answer was made, the prisoner challenged Mason, as a juror, for cause, his challenge was overruled, and Mason was sworn as a juror. It is insisted here, in behalf of the State, that this ruling is correct; and that, if it is not, the prisoner cannot complain, as he could have excluded Mason from the jury by a peremptory challenge; and that it does not appear that his peremptory challenges were exhausted before the complete impanelling of the jury.

The rule requiring impartiality in jurors has been enforced with great strictness in this State. As early as the year 1840, a juror was held incompetent, in a civil case, who was the surety of the defendant. *Ferriday v. Selser*, 4 How. 506. And in *McGuire v. State*, 87 Miss. 369, it was held that it was a valid objection to a juror in a criminal trial that he had been indicted and was untried for an offence of the same kind as that charged in the indictment. The rule, too, against the qualifications of jurors who have formed an opinion in relation to the matter in controversy has been applied with great rigor in this State. *State v. Flower, Walker*, 818; *State v. Johnson*,

Walker, 392; *Cody v. State*, 3 How. 27; *Noe v. State*, 4 How. 330; *King v. State*, 5 How. 730; *Lewis v. State*, 9 S. & M. 115; *Childress v. Ford*, 10 S & M. 25; *Nelms v. State*, 13 S. & M. 500; *Sam v. State*, 31 Miss. 480; *Williams v. State*, 32 Miss. 389; *Ogle v. State*, 33 Miss. 383; *Beason v. State*, 34 Miss. 602; *Alfred v. State*, 37 Miss. 296; *Williams v. State*, 37 Miss. 407; *George v. State*, 39 Miss. 570; *Josephine v. State*, 39 Miss. 613. It is declared that a juror should be *omni exceptione major*, and entirely free from every influence likely to produce the slightest bias towards either party, and with no motive to find a verdict for one or the other, save a sense of duty and justice. *Ferriday v. Selser*, *ubi supra*.

The intent of the law is that the juror shall come to the consideration of the case unaffected by any previous judgment, opinion, or bias, either as respects the parties or the subject-matter in controversy. The jury are sworn to decide the issue according to the evidence before them. It is expected that this oath shall be observed and this duty performed. This cannot be, if a juror has a fixed and settled opinion on the subject-matter in controversy, or as to so much of it as would materially affect his judgment on the whole. As a general rule, the inquiry in a criminal case is as to the state of the juror's mind on the question of the guilt or innocence of the accused. If he has a fixed opinion on the subject, he is excluded, because he goes into the jury-box with an opinion either for or against the prisoner, which must, according to the laws of the human mind, operate as a substitute for evidence. We know that, where a fixed opinion is thus entertained, the natural tendency of the mind is to seek for that in the evidence which will tend to confirm it, and to weaken or explain away the evidence which is against it. The mind is not, therefore, free to act on the evidence. This opinion may exist as to a subject so involved in the question of guilt or innocence that it cannot well be separated from it; or at all events it may be on a subject about which the juror's mind is to act in reaching a conclusion, and so intimately associated with the question of guilt or innocence that, in the ordinary experience of mankind, if the fact be as believed to exist by the juror, it will generally determine the main question of guilt or inno-

cence. We do not mean to say that, if the juror has made up his mind that a fact exists which is a necessary ingredient in the conclusion of the guilt of the accused, that will disqualify him, if, notwithstanding the existence of the fact, the party may be, and in similar cases frequently is, innocent; and he in fact does rest his innocence upon other facts consistent with the concession of the existence of the fact about which the juror has made up his mind. Thus it has been held that a juror who has formed the opinion that the accused did the killing is not incompetent if he has not formed an opinion as to whether he was guilty or innocent of crime in the act of killing. Notwithstanding the killing, the slayer may be, and frequently is, innocent. *Lowenberg v. People*, 27 N. Y. 386; *O'Brien v. People*, 36 N. Y. 276. On the other hand, it has been held that, when the fact about which the juror has formed an opinion necessarily determines the issue in controversy, he is not competent, though he has formed no opinion as to whether the plaintiff or defendant ought to succeed. Thus, in an action against a sheriff for trespass, when the defendant justified under a distress warrant for rent in arrear, it was held that a person who had formed and expressed an opinion that there was no right or title to the rent for which the distress was made, was incompetent. *Blake v. Mills-paugh*, 1 Johns. 816. It will be noted, however, that, in New York, where this decision was made, the sheriff making a distress stands in the exact situation of the landlord; and, if there be no rent due, he is a trespasser.

The case at bar is not so strong as that against the competency of the juror; for the prisoner may be innocent, though Williams be guilty. The charge in the indictment, however, is of falsely testifying to an *alibi* for Williams. If the testimony of the prisoner, on which the perjury is assigned is true, it is impossible that Williams could be guilty, since there is not the slightest pretence for supposing that he did the burning by the hand of another. A conviction in the mind of the juror that Williams was guilty, therefore, necessarily involved a belief that the testimony of the prisoner on the subject of the *alibi* was false. Its falsity did not necessarily make Brown guilty; for he could still make the de-

fence that it was not wilfully and corruptly false. But, when the conclusion is reached that the testimony is false, the point is very nearly reached that the prisoner is guilty of perjury. The main ground of the prisoner's defence is swept away by the belief of the juror in the falsity of the *alibi*. The question of the guilt of the person accused of the arson is so involved in the charge of perjury on the part of him who swore to an *alibi* in his behalf, that it is difficult, if not impossible, to sever the two ideas. It is impossible to lay down any precise general rule on this subject. The most we can do is to decide particular cases as they arise; and, in doing this, whenever we discover that a fact, as to the existence of which the juror has a clear and settled conviction and opinion, is so connected with the main fact in issue that it is difficult to disbelieve the co-existence of the main fact which is usually associated with the fact believed, we hold the juror incompetent. It turned out in this case that, in the trial of the prisoner, the guilt of Williams was made the basis of the disproof of the *alibi*. There was no direct proof against the *alibi*, or the testimony of Brown, so far as it related to the time of the burning. One of the main grounds laid in the evidence for the belief that the testimony of the prisoner in favor of the *alibi* is false is that, from all the circumstances, Williams was guilty of the arson. Support for this view is found in the case of *Davis v. Walker*, 60 Ill. 452.

The objection taken to the juror Krause, upon the ground that he was not a householder, should have been sustained. The fact that he had rented a store and slept in it did not constitute him a householder, as was decided in the case of *Nelson v. State*, ante, 288. But it is urged that the prisoner should have resorted to his peremptory challenges, which are not shown to have been exhausted, and thus prevented these jurors from being sworn as such. It is true that, if the prisoner had resorted to his peremptory challenges, and excluded these jurors, the mere erroneous opinion of the judge holding them to be competent would not have been, *per se*, error entitling him to a new trial. The error must be shown to have been prejudicial to him before he can claim a reversal. This prejudice would have been shown, if he had challenged per-

emptorily, and it had appeared that, before the jury was fully completed and impanelled, the prisoner had exhausted his peremptory challenges. *Ferriday v. Selser*, 4 How. 506; *Ogle v. State*, 83 Miss. 383; *Gilliam v. Brown*, 43 Miss. 641; *McGowan v. State*, 9 Yerger, 184.

But where the prisoner chooses not to exercise his right of peremptory challenge, and the incompetent juror, under an erroneous ruling of the judge, is actually sworn, and acts as a juror, the question presented is a very different one. In that case, the prisoner, notwithstanding his objections, has not had a trial by an impartial jury; nor is he obliged, in order to exclude an incompetent juror held competent by the court, to resort to his peremptory challenges. The right of peremptory challenge is a valuable one, and is allowed to the prisoner to exclude those whom he may suspect but cannot prove have a prejudice against him. It is to be exercised at his discretion, and without the assigning of any cause. He has the right to have the competency of a juror challenged by him rightly decided by the court, and to have him set aside, if he is incompetent. He may or may not, in his discretion, use his right of peremptory challenge as to such an one. If he declines to do so, and an incompetent and partial juror actually is sworn and tries the case, his legal rights have been invaded, and the verdict will be set aside. *People v. Bodine*, 1 Denio, 281; *Hooker v. State*, 4 Ohio, 348.

It is next assigned for error that the court permitted the witness Eugene and several others to testify that the prisoner was at Eugene's store in the town of Brookhaven from about 7.30 to 11 o'clock of the night on which the fire took place. It is urged that, as the fire occurred at 4 o'clock in the morning, so much of the testimony of the prisoner as shows the whereabouts of Williams in the same town and at a time which would still leave to him the opportunity to go to the house and set it on fire, is immaterial, and hence that the testimony of Eugene and others objected to was improper, because it tended only to disprove so much of the testimony of the prisoner as was immaterial. We do not consider this position sound. The testimony of the prisoner that Williams was with him from 7.30 to 11 o'clock was a part of his statement that Wil-



liams was with him at his house from 7.30 P.M. to 4 A.M. It tended to support the credibility of so much of his statement as showed that Williams was at another place than the scene of the arson at the time of the burning and shortly before it. The proof that this testimony was false, so far as related to the time between 7.30 and 11 o'clock, tended to throw discredit on his whole testimony, and was a material part of the means to be used to show the falsity of all of it. Further, this testimony of the prisoner, being thus material to support the credibility of the statement as to the *alibi* at the very time of the burning, was material evidence in the arson case, and upon it perjury may be assigned.

It is next insisted that it was error to permit the witnesses Taylor, Martin, Banks, and Isaacs to testify as to declarations made by Williams which tended to criminate him as the author of the burning. Some of these declarations consisted of direct threats to burn Smith's house, and some of threats to do Smith an injury, — all made before the burning, and in the absence of Brown. One of these witnesses also testified to what Williams said when the witness and Williams were returning from the scene of the fire immediately after it took place. We regard all these exceptions as well taken. It is true that Williams's guilt became a material fact on the trial, because, as before shown, it tended to disprove the *alibi* sworn to by the prisoner; but this fact was to be established in a proceeding in which Williams was not a party, in a controversy between the State and the prisoner Brown. So far as the question of Williams's guilt affected him, it was competent to establish it by his own declarations or admissions; but, when it is to be established as a criminating circumstance against Brown, it must be established in the same way that all other facts in the case are to be established against him.

It is insisted also as ground for a reversal that the court erred in giving the first instruction asked for by the State, because the court told the jury that they must convict if they are satisfied that Brown swore wilfully falsely to the matters charged in the indictment, or that such testimony was given by the prisoner when he did not know whether it was true or false. On

this two specific objections are made, — 1. That, as the indictment charged that the prisoner *knew* his testimony was false, he cannot be convicted unless this knowledge be proved; 2. That the alternative proposition in the instruction — “or that such testimony was given by the prisoner when he did not know whether it was true or false” — was erroneous.

The averment in an indictment for perjury that the accused knew that the matter sworn to was false is necessary only where the oath is as to the belief of the affiant. In such cases it is held that knowledge of the affiant to the contrary must be averred. *State v. Lea*, 3 Ala. 602; 2 Wharton Crim. Law, § 2261. In all other cases, such averment is unnecessary. *State v. Raymond*, 20 Iowa, 582, 585. In the case at bar, the charge is that the oath was absolute. The averment that the accused “well knew the statement to be false” was unnecessary, and therefore surplusage; and the indictment is to be construed exactly as if these words were omitted from it. The second objection to the charge has more force in it. By the alternative proposition contained in the latter clause of the instruction, the jury were directed to convict the prisoner, if they believed he made the oath charged in the indictment, and that such testimony was given by him “when he did not know whether it was true or false.” The objection to this part of the charge is that it omits to tell the jury that the oath must have been corruptly taken. It is essential to the crime of perjury that the oath shall be wilfully false. If the falsity result from mistake or inadvertence, there can be no perjury. 2 Wharton Crim. Law, §§ 2199. The criticism made on the first branch of the instruction, that it was necessary to state in it that the oath was *corruptly* false, is not well founded, since it is stated that it must be *wilfully* false. If wilfully false, it is necessarily corrupt.

Neither in the charges asked for by the State, nor in those asked for by the accused, is there any allusion to the rule requiring the testimony of two witnesses, or that of one witness and corroborating circumstances, to prove the falsity of the oath. The charges are in the usual form — “if the jury believe from the evidence,” &c. It is now complained that this omission was error, and we do not doubt that it is. In some

part of the charges the jury should have been informed that, before they could convict, it must be shown to their satisfaction by the testimony of two witnesses, or the testimony of one witness and corroborating circumstances, that the oath was false.

It is next insisted that the motion of the prisoner in arrest of the judgment should have been sustained. The objections urged against the indictment cannot be sustained. The indictment satisfies the requirements of Code 1871, § 2667.

*Judgment reversed and cause remanded.*

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EX PARTE A. T. WIMBERLY.

1. **CONTESTED ELECTIONS.** *County office. Injunction. Contempt.*

An order of the Chancery Court imprisoning a contestant for obtaining a verdict in violation of its injunction of the prosecution of an election case for a county office is void, and he may be discharged on *habeas corpus*.

57	487
78	650
57	437
191	570

2. **SAME.** *Chancery jurisdiction. Exclusive remedy by statute.*

Under our system a court of equity has no jurisdiction, under any circumstances, to enjoin the prosecution, before a justice of the peace, of such a case of contested election. The means provided by the statute (Acts 1878, p. 173) are exclusive of all others.

3. **SAME.** *Statutory tribunal. Writ of prohibition.*

If the tribunal for such contest is properly organized, no court can interrupt its proceedings within its statutory powers, and the sole remedy for a fatal defect or want of jurisdiction is the common law writ of prohibition, issuing out of a superior law court.

4. **SAME.** *Injunction. County office.*

The facts that the justice of the peace is a political friend of the contestant and that the constable is his brother are no grounds for enjoining the contest; but that would afford no excuse for violating the injunction, if, under any possible state of case, its issuance were within the power of the court.

5. **SAME.** *State officers. Chancery jurisdiction.*

An injunction from the Chancery Court to restrain a contest of the election for governor and State officers, under Code 1871, § 391, or for legislators, under Code 1871, §§ 388, 389, would be *coram non judice*, and could be disobeyed with impunity.

6. CONTEMPT. *Jurisdiction. Punishment.*

One who violates an order of a court which has jurisdiction of the person and subject-matter is liable to punishment, from which no other tribunal can relieve him.

7. SAME. *Character of want of jurisdiction.*

Want of jurisdiction, which renders the order void, is not such as is evolved from a development of the case, but such as is manifest *ab initio*, as, for instance, failure or inability to give the parties legal notice, or incapacity, in any aspect, to consider the subject-matter.

8. INJUNCTION. *Actions at law. Writ of prohibition.*

There are classes of cases, such as criminal prosecutions, actions of mandamus, and writs of prohibition, in which the general jurisdiction of the Chancery Court, to enjoin actions at law, does not exist, and, if attempted to be exercised by the court, its orders are void.

APPEAL from the decision of Hon. J. W. C. WATSON, Judge of the Second District of Mississippi, on *habeas corpus*, dismissing the petition, and remanding the relator to custody.

*W. S. Featherston* and *R. Davis*, for the appellant, each made an oral argument.

*W. P. Harris*, on the same side, argued the case orally and filed a brief.

1. We cannot separate the attachment proceedings from the order disobeyed, and make them the substantive ground of jurisdiction. The power to punish a party for violating an injunction is essentially and primarily the power to enforce obedience to it. If the court had no jurisdiction to make the order, any steps to enforce it are illegal. A void order cannot, in the nature of things, uphold proceedings to enforce it, and a judgment punishing the recusant party cannot be regarded as a lawful judgment. Bishop Crim. Law, 257; Freeman on Judgments, § 117. It is competent on the writ of *habeas corpus* to inquire into the validity of the order disobeyed. There can be no lawful punishment if no crime has been committed. Judge Black, in *Passmore Williamson's Case*, 26 Penn. St. 9, attempted to support the proposition that proceedings for a contempt are as independent of the order disobeyed as an indictment for perjury is from the case in which it was committed, and that in adjudging the party guilty of a contempt, the court closes the door to any

inquiry into the validity of the order disobeyed. The cases he cites do not support that view. If we suppose the Circuit Court to undertake the probate of a will, no one would advance the proposition that a witness sworn in such proceedings could be indicted for perjury, because there was no material issue which that court could decide. The cases he cites, in which it was held that the judgment for contempt precluded the inquiry whether a contempt had been committed, refer to contempt in the presence and hearing or in the verge of the court. *Ex parte Summers*, 5 Ired. 149; *State v. Woodfin*, 5 Ired. 199. The illustrations given by this ingenious judge are not pertinent. A court may in many cases have the power to determine the very point of jurisdiction, that is, whether a crime charged was committed on the high seas, or in the body of a county, or within the territorial jurisdiction of the court. The fact may be developed that the crime was not committed within such jurisdiction. In such cases, the court has jurisdiction to investigate the fact, and although it may turn out that the court has no jurisdiction to punish, still its proceedings are valid. It is bound to make the investigation, because the locality is an ingredient of the offence. These cases differ widely from those in which no investigation can develop anything on which the court can act, as if a court of equity should undertake to investigate a case of murder, or the Circuit Court should assume to probate a will and grant letters testamentary. The cases of contempt in the presence or hearing of the court stand on very different ground from those arising from disobedience of an injunction or other mandate. From necessity the court must judge exclusively and finally of contempts in its hearing or presence; but it is otherwise in the other class of cases. In that class the inquiry may be made whether a contempt has been committed, that is, whether the order disobeyed was one which the party was bound to obey; for the order is the ground of commitment, and if it is without authority, the commitment is illegal. *Hurd on Habeas Corpus*, 327, 340, 341. If the order was one which the court could predicate, in a proper case, on a subject within its general jurisdiction, then it matters not that in the particular case it was error to make it. It matters not how palpable the error, the order cannot be

collaterally attached; but when the order is void, a different rule prevails.

2. Proceeding, therefore, to the main question here, we assert that the injunction was void, because the court had no jurisdiction of the subject-matter. The subject-matter was the contested election, in process of being tried. The action of the circuit judge rests on a proposition that places the Chancery Court in a position as respects all other courts which it does not hold, and is plainly wrong. It is, that the general power to grant writs of injunction, especially to restrain proceedings at law, being conceded, every injunction is necessarily valid. It might as well be said that, the general power to make decrees being granted, every decree is valid. We cannot with accuracy point out every case in which the power to grant an injunction exists, but we can point to cases in which the power does not exist. In this case the court or chancellor had no jurisdiction to make any decree touching the subject, and no power, therefore, to issue the injunction. We use the term "jurisdiction" here in a sense different from that in which it is employed when we speak of the difference between legal and equitable remedies. The court of chancery frequently dismisses a bill because the remedy is at law, and a court of law declines to take cognizance of a right that is termed equitable only. These courts have each the right to ascertain the character of the right, and to determine where the remedy lies. Jurisdiction in that sense is a subject of investigation and adjudication by the court. The investigation may develop the fact that the remedy is in one or the other court, or that there is no equity, or no legal cause of action. But we use the term, jurisdiction, here, to indicate that where no investigation can develop any fact on which the court can act, the attempt to exercise it is usurpation; as in the case supposed, of a court of law undertaking to administer an estate, or a court of equity attempting to try a person for a crime. Where jurisdiction or power over a given subject is confided exclusively to a particular tribunal, it is usurpation for another tribunal to undertake to control its action or to decide the cause.

3. The Constitution directs the legislature to provide for de-

termining contested elections. The legislature, in Code 1871, § 391, and the act of 1878 (Acts 1878, p. 173), has provided a special mode of trying the question, and it is necessarily exclusive. It will be conceded that the subject never belonged to jurisdiction in equity. The statute withdraws it from all courts except those to which it is confided. The court or tribunal is called into existence by the petition of the contestant. It has but one function, and that is exclusive. It is required to summon a jury, and this jury is to recount the votes, and say which of the claimants obtained the largest number of legal votes. The statute aims to have the contest determined prior to the time the term of office begins, and requires that within twenty days after the first Tuesday of November the petition shall be filed and a jury summoned, and that the opposite party shall be cited to appear within five days thereafter. The finding of the jury entitles the party to his commission. An appeal is allowed, but not to operate as a *supersedeas*, and the Circuit Court is prohibited from granting a writ of *certiorari*. It is a summary proceeding, made so for the benefit of the public in a large measure. The object is, by a satisfactory test, to ascertain who shall be installed when the term of office begins. The justice of the peace does not exercise the powers of a justice's court. He has no terms of court, and no power of continuing his function. It is obvious that the statute designed to cut off delay. If a justice should continue the trial until after January following, he would violate the law. If any court should grant a *supersedeas* after verdict, that would be illegal.

4. It is plain, therefore, that the Chancery Court cannot take charge of the cause, and postpone it until it shall see fit to allow it to proceed. That court can decide nothing touching the contest. There is no equitable title, nor any point which that court can determine. To enjoin the contestant is to stop the court if he obeys the injunction. What is to become of the judge and the jury? It is clear that to touch the proceeding by injunction is to defeat the statute. The special court cannot survive the interference. To touch it is to destroy it. We deny that this injunction is an ordinary injunction, restraining proceedings at law. Such injunc-

tions proceed on the idea that the legal forum is so constituted that it must be an instrument of injustice because it cannot take cognizance of certain equities in the case. Here, the object is not to change the forum, or to arrest the remedy because it is a legal remedy. The bill rests on the allegation that the particular justice selected is a prejudiced partisan, who has prejudged the cause. This is not a subject of judicial inquiry in any court. Suppose it should be decided that he is a bigoted partisan, and had prejudged the cause, what is to follow? It does not disqualify him. The parties are guarded against a biased jury by an indefinite number of challenges for cause and ten peremptory challenges. It is clearly wrong to suppose that because a Chancellor is armed with the formidable ordinance, the writ of injunction, he may discharge it at anybody or anything,—at this contested election machinery to its destruction. Its effect must be to overthrow the proceeding and defeat the statute. The bill suggests no case in which we can conceive that the court could legally interfere. The course of decisions is adverse to the exercise of the power here exercised in election matters. *Dickey v. Reed*, 78 Ill. 261; *Lawrence v. Knight*, 1 Brewster, 69; S. C. Brightly's Election Cases, 617; *Hulseman v. Rems*, 41 Penn. St. 396; McCrary's Law of Elections, §§ 220, 318, 340; *Erie Railway Co. v. Ramsey*, 45 N. Y. 637; *Tyler v. Hamersley*, 44 Conn. 419; *People v. Sturtevant* 9 N. Y. 263. It is conceded that the Chancery Court can decide nothing touching the contest. The bill presents matter which, decided one way or the other, gives no ground for any decree. Indeed, the bill does not propose to withdraw the case for any decree to be made, but simply to postpone the trial indefinitely. It proposes, in short, to put an end to the special court. How is it to be started again, long after the time appointed by the statute—within which it must act, or be useless for the principal object in view—has elapsed. It is enough to concede that a court may, without inquiry direct or indirect, punish for contempts committed in its presence or hearing, and that no one can with impunity disobey an injunction merely erroneous. To go further than this is not essential to the dignity or the authority of courts.



*A. H. Whitfield*, on the same side.

The Chancery Court had no jurisdiction of the subject-matter, — none to issue the injunction; and the necessary consequence is that it is a nullity. *Lawrence v. Knight*, 1 Brewster, 69; *Hulseman v. Rems*, 41 Penn. St. 396; McCrary's Law of Elections, §§ 220, 318, 340. It is possible for a paper to issue from a Chancery Court, signed, sealed and correct in form, and yet which is no more in anybody's way, and disregard of which no more jeopardizes anybody's rights, than if it never had been, because it is a nullity. Suppose a bill, properly framed, were presented to a Chancellor, setting up that it was unrighteous and fraudulent that a man should say that the sun rose in the east, and praying an injunction restraining a particular individual from thereafter publicly saying so, and the injunction, perfect in form, were issued, and this party afterwards did publicly make the statement, and was arrested and fined, would any reasonable man pretend that the Chancellor had jurisdiction either of the subject-matter or to issue an injunction, or that the fine was not a farce? If the court has no jurisdiction to issue the writ, it is not only void, but it is the duty of the court in which the proceeding enjoined is pending to make its officers disregard the injunction and to protect them in so doing. *Tyler v. Hamersley*, 44 Conn. 419. In *Dickey v. Reed*, 78 Ill. 261, it is held that a writ of injunction is *coram non judice*, if issued in a matter which the court could not, under any circumstances, have power to hear or determine. *Commercial Bank v. Waters*, 10 S. & M. 559, decides that whenever a person is arrested for violating an injunction, the question of its validity is directly presented. The only effect of the violation of the injunction would be to subject the violator to punishment for contempt, and it would in no wise affect the validity of the verdict and judgment. In *Robertson v. Hay*, 12 S. & M. 566, the court held that "an injunction does not operate upon a cause of action, but as a restraint upon the person"; and that "the corrective," where an injunction has been violated, is not by dismissing the suit which has been proceeded with, but by punishment as for contempt; and cited and reaffirmed *Commercial Bank v. Waters*, *ubi supra*.

No counsel *contra*.

CHALMERS, J., delivered the opinion of the court.

The relator who has, by the Hon. A. B. Fly, Chancellor of the Second Judicial District, been committed to six months' imprisonment and sentenced to pay a fine of one thousand dollars for a contempt of court in violating an injunction issued to and served upon him, brings this writ of *habeas corpus* for the purpose of regaining his liberty. That he violated the injunction is not denied: the claim is that it was a nullity because the Chancery Court had no jurisdiction of the subject-matter sought to be enjoined. The relator had been a candidate at the late general election in this State for the office of chancery clerk of Yalobusha County. The registrars of the county, adjudging that his opponent Brannon had been and that he had not been elected, delivered to Brannon the customary certificate of election. Thereupon the relator, within the time and in the mode prescribed by law (Acts 1878, p. 178), instituted before a justice of the peace the proper proceedings for contesting the election. A few days before the time fixed for the trial, Brannon sought and obtained from the Chancellor in vacation, upon grounds to be hereafter noted, an order enjoining and restraining the relator from prosecuting said suit. In violation of the injunction, the contest before the justice was proceeded with, and resulted in a verdict and judgment for the relator. It is for this conduct that he has been committed to jail, and it is the validity of the injunction that we are called upon to determine.

He who knowingly disregards or violates the orders of a court of general jurisdiction acts at his peril, and subjects himself, if the orders be lawful, to a punishment which ordinarily is left to the discretion of the tribunal whose authority has been defied, and from which no other court can release him. From consequences so severe there is usually but one method of escape, viz., by showing that the court whose commands have been disregarded was without jurisdiction of the person over whom, or the subject-matter over which, it assumed to exercise its authority. It will not avail the offender that the order was improvidently made upon insufficient grounds, and would be reversed by a higher tribunal; nor that the court issuing it was not justified in making the particular

order that was disobeyed, but should have made another and a different one. Neither can he urge that, upon the allegations contained in the application for the order, no facts were stated which made out a case against him or entitled the applicant to any relief. All these are matters to be considered by the court that makes the order, and by the tribunal which reviews its action on appeal; but they cannot be decided by the party himself. It is sufficient for him that a court, which by the laws of his country had the right to consider the subject, has passed its judgment upon it. If that judgment be wrong, he must ask its correction where it was rendered, or appeal to some higher power for relief. If, instead of doing this, he determines to disregard it and take the consequences, he can make those consequences innocuous only by showing that there was an inherent want of jurisdiction in the court to make any order whatever on the subject.

The want of jurisdiction here referred to is something widely different from the sense in which the words are used when we say that a court of law has no jurisdiction to settle a partnership account, or that a court of equity cannot entertain a suit sounding wholly in damages; because it frequently admits of doubt, in the inception of a litigation, whether the particular suit before the court should not have been instituted in some other tribunal; and while the court is considering this question and evolving the facts necessary to its determination, its authority must be respected and its orders obeyed. When we say that a person may safely disobey the commands of a court which is without jurisdiction to issue them, we mean either that it has failed to give, or is incapable for some reason of giving, legal notice to the person whose rights are to be affected, or that the subject-matter of the controversy is one which that court has no right to consider in any aspect whatever. Thus, if a court of law should assume jurisdiction of a suit for divorce, and issue an order for alimony *pendente lite*, the person against whom it was entered might safely disregard it. So, if a court of chancery should undertake to interfere in any way with a criminal prosecution, or to enjoin a convicted person from asking for an executive pardon, its action would be utterly null, and might be so treated by every one. These illustrations

enable us to appreciate the difference between that class of cases where there may or may not be jurisdiction—according as a full development of the facts may show that relief is to be sought in the one forum or the other, and where consequently it is the duty of the court first applied to to have the facts developed, with a view of determining the question of jurisdiction—and that other class of cases where it is at once perceived, from a mere mention of the subject-matter of controversy, that no condition of facts can give jurisdiction. In the one case, the orders of the court must be respected. In the other, they may be treated as the impotent commands of a private person masquerading in the guise of judicial authority. Let us test the case at bar by these principles, and see under which class it falls.

The relator had instituted, in the mode and manner and before the tribunal specially constituted for that purpose, a proceeding to test the question whether he or his opponent had received the greater number of legal votes. He was enjoined from prosecuting that contest until such time had elapsed that a decision in his favor would be immediately succeeded by a term of the Circuit Court of the county, so that his enjoyment of the profits of the office would be short-lived if there should be a reversal in the higher court. The grounds of the application were that the justice of the peace before whom the case was to be tried was a political supporter and a bitter partisan of the relator; that the constable of the court was his brother; that a judgment in his favor would certainly be rendered without regard to the merits of the contest; and that, inasmuch as an appeal did not by the terms of the statute operate as a *supersedeas*, he would, if the case was tried at once, enjoy for a period of five or six months the emoluments of an office to which he had not been elected. It is at once perceived that these grounds were wholly insufficient to justify the issuance of the injunction or any other relief whatever. That a judge is the political or personal friend of a litigant constitutes no ground for enjoining the prosecution of a suit before him, even where he is the sole trier of the facts, and still less so where, as in this case, the issue was to be determined by a jury; nor does the fact

that the jury is to be summoned by a sheriff or constable who is related to the opposing party add any strength to the objections to proceeding with the trial. It is quite manifest that the injunction was improvidently granted, and doubtless would have been, and certainly should have been, dissolved upon motion. This, however, as we have seen, affords no excuse for violating it if under any possible state of facts its issuance would have been within the power of the court. The question presented, therefore, is whether, under our system of laws, there is any jurisdiction in a court of equity, under any circumstances, to enjoin the prosecution of a case of contested election. If the ultimate object of the injunction be to withdraw from the special tribunal created by the statute the determination of the contest, and to give to the Chancery Court the settlement of the question as to who has been elected, it is plainly beyond the jurisdiction of the court. Neither by the principles of the English court of chancery nor by our statutes can courts of equity take cognizance of such subjects. Such contests partake as much of public as of private right, and belong rather to the political than to the judicial department of the government; and in so far as they involve the property rights of the contestants to the powers and emoluments of the office, they present purely legal issues, determinable in a court of law. We are not aware that, even in States where there exist no statutory provisions for the speedy settlement of such contests, they have ever been held to fall within the jurisdiction of courts of equity, and certainly it is well settled that when statutory regulations on the subject have been adopted, the means provided by the statute are exclusive of all others. *Hulseman v. Rems*, 41 Penn. St. 396; *Dickey v. Reed*, 78 Ill. 261; McCrary's Law of Elections, §§ 318-458, and authorities cited.

But the bill for an injunction in this case did not seek to draw to the Chancery Court a settlement of the questions involved in the proceedings before the justice, but only asked, for special reasons, that those proceedings might be temporarily stayed. Conceding, then, that a court of chancery cannot try a contested election case, may it enjoin a trial of such a case by the tribunal which alone has authority to try it? The power of the Chancery Court to enjoin actions at law is ancient

and indisputable; and hence it is argued that, as it has this power, it must necessarily have authority to determine whether a particular action should be enjoined or not; that while it is determining this question, it has the right to make all necessary preliminary orders, and to punish those who violate them. If it be, indeed, a question whether an injunction shall issue in the special case in hand, the position is indisputable, and it is undoubtedly true that he who disobeys an order issued while the court is considering such a question is punishable even though the order be, as said by the Court of Appeals of New York, "hastily, improvidently, or wickedly granted." *Erie Railway Co. v. Ramsey*, 45 N. Y. 637, 644. But a very different question is presented when the issue is not whether the court has authority to enjoin the special action at law complained of, but whether it can enjoin any action whatever belonging to a general class of actions; for while it is true that most actions at law may be enjoined, there are large classes of them as to which no state of facts will justify the interposition of a court of equity. It is well settled that criminal prosecutions, whether by indictments or information, actions of mandamus, and writs of prohibition, can, under no circumstances, be enjoined by a court of chancery. 2 Story Eq. Jur. § 898. It is equally clear that under our statutes prescribing the method of contesting before the legislature the rights of the members to their seats (Code 1871, §§ 888, 389), or of contesting before the same body the result of elections for governor and other State officers (Code 1871, § 391), the Chancery Court could not enjoin the prosecution of such contests, and if it assumed to do so, its orders might be disobeyed with impunity. It is thus seen that, notwithstanding the general jurisdiction of a court of equity to enjoin actions at law, the power is not universal, and that there are large classes of actions where no such power exists, and where, if it is attempted to be exercised, its acts will be mere *brutum fulmen*, conferring no rights if respected, and imposing no penalties if disobeyed. Whether contested election cases involving the right to county offices are of this character, under our laws, must be determined by an inspection of the statutes and a consideration of the objects intended to be subserved by them.

Our general elections for county officers take place biennially on the first Tuesday in November. The officers chosen at them are installed in office on the first Monday in January thereafter. The boards of registrars of each county are required to assemble at their respective county seats by twelve o'clock on the second day after the election, count the votes, and deliver to the candidates shown by the ballots to have received the largest number of votes, a certificate of that fact, and immediately to forward to the Secretary of State, at the capitol, an additional certificate of the result as to every candidate voted for at the election. Code 1871, § 377. Any person dissatisfied with the result as thus announced may, *within twenty days after the election*, file his petition for a contest before any justice of the peace of the county. The justice shall thereupon issue a summons to the party holding the certificate, returnable in *five days*, and shall make up an issue to be tried by a jury as to which candidate has received the greatest number of legal votes, and no other question is permitted to be submitted to the jury. Each party shall have ten peremptory challenges besides challenges for cause. If the jury shall find against the person holding the certificate of the registrars, the justice shall enter up a judgment in his favor, and forthwith forward a duly certified transcript of the proceedings to the governor, who shall at once issue a commission to the person found by the jury to have been elected. No court can issue a writ of *certiorari* to review said proceedings, and though the unsuccessful party may appeal to the next term of the Circuit Court, and there have a trial *de novo*, such appeal shall not operate as a *supersedeas*. Acts 1878, p. 178.

The manifest purpose of these provisions is to prescribe a method of determining contests growing out of county elections, which by its simplicity, convenience of access by the parties, and celerity of proceeding shall culminate in a verdict ascertaining the result of the election before the period fixed by law for the installation of the officer. No court by writ of *certiorari* can transfer the proceedings to any other tribunal, and though the right of appeal is preserved, it does not prevent the installation of the successful party. The right given to the contestant of choosing the justice before whom he will inaugurate his

contest, and the denial of a *supersedeas* to his unsuccessful opponent, give the former a great advantage ; but we cannot inquire into the wisdom of the law, and it is evident that these provisions sprang from the anxiety of the lawgiver to ensure such speedy adjudication of the case that, by the first Monday in January, no doubt should exist as to the person entitled to qualify. The public interest in this question is to override the private interest of the parties. If a court of chancery is at liberty to interrupt the proceedings by writs of injunction, the whole scheme is defeated. Even a temporary injunction might produce complications difficult, if not impossible, of solution. The tribunal created by the statute is a special one, *pro re nata*, unknown to our ordinary jurisprudence, and must die with the occasion that brought it into being. The justice of the peace presides, not by virtue of his functions as such, but only because designated by the statute. The court when organized is not a justice's court. It has no terms. It cannot continue the case to a distant day or even adjourn its sessions, except from day to day as the exigencies of the trial may demand. If once dispersed, how is it to be reassembled ? If shattered by the weight of a Chancellor's injunction, how are its several parts to be reunited ? If in the case at bar, after the court had been opened and the jury sworn, the injunction prayed had been made perpetual, how could there ever have been an investigation of the question as to who had received the highest number of legal votes ? These objections, if not insuperable (and we are not to be understood as denying the power of the justice to reconvene the jury under any circumstances), suggest the great practical inconvenience of permitting the interference of a court of equity.

Our conclusion is, that the jurisdiction of the special tribunal created by the statute for the determination of an election contest is exclusive ; that when such tribunal has been organized within the time and in the manner prescribed, it cannot be interfered with by any other court, so long as it confines itself to the matter confided to it by the statute. If it has not been so organized, and if the defect in its organization is so fatal as to leave it without jurisdiction, or if, being properly organized, it is exceeding its jurisdiction in its conduct of



the trial, the only remedy is by the common-law writ of prohibition, issuing out of some superior common-law court; and this writ can be invoked only upon grounds which are jurisdictional in their character. It follows from these views that the injunction issued by the Chancellor was a nullity, and that the relator did not subject himself to punishment in disregarding it. The action of the circuit judge, dismissing the writ of *habeas corpus* and remanding the relator to confinement, is reversed, and an order will be entered here for his discharge.

*So ordered.*

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JOHN FRIERSON v. LOUISA WILLIAMS ET AL.

1. **MARRIED WOMAN.** *Separate estate under a will. Equitable charges.*  
A married woman holds land in this State, which is devised to her "sole and separate use" wherein her husband "shall have no right or interest," under the will alone; and her power to charge it is determined, not by the statute, but by the general principles of equity in relation to such estates.
2. **SAME.** *Absence of trustee. Power to charge. The statute inapplicable.*  
The failure of the will to name a trustee of the legal title does not subject her estate to the operation of the married woman's statute, but she holds the land devised free from the control of her husband, and with power to charge it as a *feme sole*, according to the provisions of the will.
3. **CONFLICT OF LAWS.** *Lex rei sitæ. Lex loci contractus. Lex domicilii.*  
A promissory note made by such wife as surety for her husband, in Louisiana, where she resides, although void by the law of that State, can be enforced against the land in this, if she contracted with reference thereto, and intended to charge it with the debt.

ERROR to the Chancery Court of Coahoma County.

HON. W. G. PHELPS, Chancellor.

*Shelton & Shelton*, for the plaintiff in error.

1. Mrs. Williams's interest in the land and its use, her powers over both, and her contracts and liabilities with reference thereto are not controlled by the Mississippi statutes relating to married women and their property, but by the will and the

rules of law and equity applicable to her rights and powers thereunder. 2 Story Eq. Jur. § 1380. In support of this principle and its application to this case, the counsel urged these points: (1) The will conveys to the wife a moiety for her life, to her "sole and separate use," separate and apart from her husband, in which her husband "shall have no right or interest," with remainder to her daughters. This makes her as to this property a *feme sole*, with all the powers of an unmarried woman in reference to it; and it takes from the husband all his rights and powers at the common law, such as his joint seizure with her; his freehold estate; his curtesy before and after her death; the liability of his curtesy for his debts; his ability to sell it and transfer possession; and his right to the rents and profits. See 1 Wash. Real Prop. p. 140, § 47. It also takes from him all the rights and powers conferred by the Mississippi statutes, such as curtesy, both before and after her death; his right to joint occupancy with her, to manage the estate, to make rent-contracts and collect rents; his power to create a debt against the estate by buying supplies, to defeat her sale by refusing to join in her deed and thus defeat all alienation, since she could not make a will. *Garratt v. Dabney*, 27 Miss. 335, 344. (2) On the face of the Mississippi statutes, there is no prohibition against the equitable liability of a married woman's separate property in a case like this, because the attempt in this case is not to enforce the husband's debt against her property, but her own debt; it is not to enforce a liability created or attempted to be created against her property by the husband, but an equitable liability, created, if at all, by herself; it is not to enforce a sale, conveyance, mortgage, transfer, or encumbrance by him; it is not to enforce either of these made by any person, for the equitable liability which we seek to establish is neither of the five: a liability is not an encumbrance.

2. The statutes being out of the case, the will empowers the wife to make the land and its products liable in equity for her debts. It makes her as to this property a *feme sole*. To create such a power in a wife no technical words are necessary. If the testator's intent is clear, that is enough. Words much less potent have conferred *feme sole* powers. These

have been held sufficient: "to her sole use or disposal," "to her sole use and benefit," "to her use during her life, independent of her husband," "to be her pin-money," "stock given to her, not to be disposed of by her husband," "for her benefit, independent of the control of her husband," "rents and profits to her for her separate use" (*feme sole* as to the rents and profits). 2 Story Eq. Jur. §§ 1381, 1382; *Hulme v. Tenant*, 1 Bro. Ch. 16; *Hamilton v. Bishop*, 8 Yerger, 33; *Johnston v. Ferguson*, 2 Met. (Ky.) 503; Clancy on Husband and Wife, 251.

8. Mrs. Williams, having made the note as security for her husband, with the intent to make her separate estate and its revenues liable, and to enable her husband to buy future supplies and borrow money thereon, and Frierson having furnished these relying on that note, her life estate and its income are, by the principles of equity, liable for it. The difference between the estate of a married woman held separately from her husband, under a statute like ours, and her estate held separately under a will or grant, is that the former is a legal, the latter an equitable estate; as to the former, a liability is a legal liability, and may be enforced against her legal estate by suit, judgment, and execution, — a legal remedy on a legal contract against a legal estate. To these the statutes apply, and they do not purport to apply to any other separate estates. But to the equitable estates and liabilities under powers conferred by a will, the statutory rules and remedies cannot apply; the will and the principles of equity are our only guides as to her rights and powers over her separate estate and liabilities thereof created by her. English authorities have established the rule for centuries; it has been recognized in Mississippi and other States when there were no such statutes in the question. *Wynne v. Wynne*, 23 Miss. 251; *Frazier v. Brownlow*, 3 Ired. Eq. 237; *Harris v. Harris*, 7 Ired. Eq. 111. But does that capacity to create an equitable liability remain, notwithstanding our statutes, where a will gives her the estate and use, with the powers of a *feme sole* in reference to it? Since the married woman's laws, this equitable liability has been often sustained. *Garrett v. Dabney*, 27 Miss. 335; *Block v. Cross*, 36 Miss. 549; *Boarman v. Groves*, 23 Miss. 280; *Clark v.*

*Slaughter*, 38 Miss. 64; *Bank of Louisiana v. Williams*, 46 Miss. 618; *Musson v. Trigg*, 51 Miss. 172; *Frazier v. Brownlow*, 3 Ired. Eq. 237; *Harris v. Harris*, 7 Ired. Eq. 111.

4. It is not equitable to hold that because she got direct title without a trustee, the equitable liability which we invoke fails to be applicable; for her estate is not merely a legal title, but is made by the will an estate held by her separate and apart from her husband and as a *feme sole*. That feature of the estate a court of law cannot protect or enforce: a court of equity can. But if such an estate could be a merely legal estate, equity could hold it subject to her debt for which she had made it equitably liable; for by the will she is made *sole* as to that property, and therefore has as to it all the powers of a *feme sole* which are not prohibited by the will. *Block v. Cross*, 36 Miss. 549; *Clark v. Slaughter*, 38 Miss. 64; *Bank of Louisiana v. Williams*, 46 Miss. 618; *Musson v. Trigg*, 51 Miss. 172; *Frazier v. Brownlow*, 3 Ired. Eq. 237; *Harris v. Harris*, 7 Ired. Eq. 111; *Shirley v. Shirley*, 9 Paige, 363; *Jamison v. Brady*, 6 Serg. & R. 466; *Abrams v. Whitmore*, 4 Desauss. 251; 1 Bishop on Married Women, § 792, 794, 800-803; 2 Story Eq. Jur. § 1380; Tyler on Infancy & Coverture, § 303.

5. At least the products of the life estate should be held liable. A wife holding personal property in her own right, such as crops of her separate estate, is under no disability as to them, but has power to sell, control and appropriate them, and may bind them in equity for payment of her debts; otherwise she could make no disposition of them, or pay her debts for supplies. *Block v. Cross*, 36 Miss. 549; *Clark v. Slaughter*, 38 Miss. 64.

6. The conclusion from the foregoing principles is not changed because the note was made in Louisiana by a Louisiana wife. (1) If the note is void as a personal obligation in Louisiana, so it would be in Mississippi, if made here by a Mississippi wife; yet here the equitable liability of her Mississippi lands would be sustained. Inter-State courtesy does not demand that we shall exempt the Mississippi lands of a Louisiana wife when we would not exempt those of a Mississippi wife. Wharton Conf. Laws, §§ 278-280. It is only the per-

sonal capacity that is controlled by the *lex domicilii*, but the *lex rei sitæ* gives or withholds the capacity to charge or alienate land, and prescribes modes of doing it. The same rule applies to rents, mortgages and liens. Wharton Confl. Laws, §§ 272-277, 286, 291; Story Confl. Laws, §§ 363-365, 424. (2) Mrs. McGuire's will was made at her home in Mississippi, by a citizen and resident thereof, where she died, and where her will was proved, recorded and executed. Mrs. Williams attempted to execute her *feme sole* powers, created by it, on Mississippi lands. The non-residence of a donee of powers created by a will on Mississippi immovables neither defeats nor suspends the powers, nor subjects the execution of them on Mississippi lands to the laws of any other State or nation.

*George Winston*, on the same side, filed a brief, which the reporter has been unable to obtain.

*Frank Johnston*, for the defendants in error.

1. Are Mrs. Williams's powers of charging or alienating this property governed by the statutes of this State or by the general principles that apply to separate estates of married women, by which is meant equitable estates? The whole doctrine of the powers of married women in equity grow out of the trust nature of the estate. These powers were never *legal*, but *equitable*, and had no existence in connection with legal estates. A grantor conferring a legal estate on a trustee for the married woman invested her with certain powers over the equitable estate which a court of equity recognized, and permitted her to use. But nothing that she did, either by changing, or conveying by appointment, had any operation beyond the equitable estate. The trustee held the legal title and was the owner of the estate at law. This whole doctrine, therefore, arising out of equitable estates, is strictly limited thereto. In treating of the subject of the equitable powers of married women, Bishop says it only applies to equitable estates. 1 Bishop on Married Women, §§ 792, 793, 794. These estates are created by an instrument vesting the legal estate in some third person, and the power of the *feme covert* over such property is in the nature of a power of appointment. 1 Bishop on Married Women, § 795 and note 1; *Albany Ins. Co. v. Bay*, 4 Comst. 9. Again this author says, the expression "sepa-

rate estate" used in discussions of this subject, "always refers to an equitable estate held by somebody in trust for a married woman." 1 Bishop on Married Women, § 795; *Todd's Appeal*, 24 Penn. St. 429. It only applies to equitable estates held in trust for a married woman. *Musson v. Trigg*, 51 Miss. 172; *Hackett v. Metcalfe*, 6 Bush, 352; *Johnston v. Jones*, 12 B. Mon. 326; *De Vries v. Conklin*, 22 Mich. 255; *Richardson v. Stodder*, 100 Mass. 528; *Garrett v. Dabney*, 27 Miss. 335.

2. The inquiry next arises, whether this is a legal or equitable estate. By the devise under which Mrs. Williams holds the property, or rather by which she acquired it, the whole estate is vested directly in her. There is no trustee; there is no creation of any equitable estate, nor the grant of any special equitable powers of charging, alienating, or appointing. It simply gives her the property as her own, using the words for "her separate use." The testatrix intended to confer upon her, not only the equitable ownership, but the legal title and estate. The devise was to her directly. Under the statute, she undoubtedly had the full capacity to take and hold the legal title and estate. The statute embraces all modes of acquisition,—by will, descent, distribution, deed, recovery or otherwise. Code 1871, § 1778. As the testatrix devised to her directly the legal title and estate, as well as the actual ownership, and as Mrs. Williams had the capacity to take what the will attempted to confer, this is in every respect a legal and not an equitable estate. In order to work out the idea of an equitable estate, it is said that her husband is her trustee, as she could not be her own trustee. A court of equity has sometimes held the husband's legal estate charged with a trust in favor of the wife; but it was because there was no trustee named, and because the wife could not at common law hold a legal title or estate. In a case where the conveyance of the legal title is to the wife, and where she has the legal capacity to hold the legal title, would a court of equity divest her legal title by declaring it in her husband as trustee, and change the estate created by a grantor or testator into an equitable estate? Unless this can be done, then the estate in this case is a legal and not an equitable one. Mrs. Williams is legal owner, and not a *cestui que*

*trust*; her powers are legal, and not equitable. And, lastly, as there is no specific grant of powers in the devise creating the estate, the statute, and not general equity principles, furnishes the rule for the solution of this case. The argument that the husband's statutory agency is limited by implication, on construction of this will, is not intrinsically sound; and if it were, it could not affect the question of Mrs. Williams's capacity to charge the property with her debts. Granting the husband's statutory agency, it by no means enlarges the statutory powers of the wife. The use of the words, for her "separate use," does not change the character of the estate, for those terms are used in the statute. The statutory capacity of Mrs. Williams to take this legal estate is not fully considered in counsel's argument that the husband will be treated as her trustee. A court of equity never indulges in this sort of fiction, except where there would be a failure of an estate, or in case of the wife's interest, where she could not take the legal estate. At common law, the legal estate, where there was no trustee, went to the husband, and in a court of law she had no rights. In this condition of things, a court of equity declared the husband to be a trustee. But where she has as perfect a legal capacity as her husband to own and hold legal estates, there is neither place nor reason for this contrivance. The estate, therefore, becomes a legal one in every respect. Equitable estates may still be created independently of the statute, but not by conveyances of legal estates directly to the wife. Even, however, if an equitable estate is created by an instrument that is silent on the subject of special powers, either of charging or of alienation, the case of *Dibrell v. Carlisle*, 48 Miss. 691, is conclusive in support of the position that the statute furnishes the test of Mrs. Williams's powers. In that case, there was a trustee and an equitable estate. It was argued by counsel that she had the powers of a *feme sole* on general equity principles, as the instrument creating the estate prescribed no limitations of her powers. The question of her power of binding the estate by conveyance, as well as of charging the estate in equity for debts, was considered and decided. In *Musson v. Trigg*, 51 Miss. 172, there was a trustee, and an express

grant of broad and specific powers to the wife. In a word, she was made a *feme sole* as to the separate estate conferred on her by the terms of the settlement.

3. The note of Mrs. Williams for the husband's debt, made in Louisiana, by the *lex loci contractus* is absolutely null. *Bartington v. Bradley*, 16 La. An. 810; *Summers v. Brannins*, 22 La. An. 386; *Koechlin v. Thontke*, 26 La. An. 737. Being thus void where made, it can have no validity elsewhere. The case falls within the general principle. Her power is not to be measured by Mississippi law as to property in this State. The law of the domicile as to majority or minority governs, in respect even to property situate in another territory. Judge Story says: "If by the law of the place of his original domicile a person cannot make a will of his property before he is twenty-one years of age, he cannot, if under that age, make a valid will even of such property as is situate in a place where the law allows persons of the age of fourteen years to make a will of the like property. So, if by the law of her original domicile a married woman cannot dispose of her property except with the consent of her husband, she is equally prohibited from disposing of her property situate in another place, where no such consent is requisite." Story Conf. of Laws, § 52. On the general principles governing such contracts, see *Brown v. Freeland*, 34 Miss. 181; *Carroll v. Renich*, 7 S. & M. 798; *Ivey v. Lalland*, 42 Miss. 444. But this is not technically a case of the conveyance of real estate. The effort is to reach the land by enforcing the obligation of the wife for the husband's debt. There is no liability of the wife underlying the note and distinct from it. Her liability begins and ends in the note, which is void. If it is said that there was an intention to create an obligation enforceable against Mississippi property, then no such intention can be imputed to a note absolutely void by the law of the place of its execution, and known by all the parties to be a nullity.

GEORGE, C. J., delivered the opinion of the court.

The plaintiff in error filed his bill in the Chancery Court of Coahoma County against John Williams and his wife for the purpose of collecting out of the separate estate of Mrs. Wil-



liams a note for six thousand and fifty dollars, made by Williams and wife, in February, 1878, payable to the order of Williams, the husband, and by him indorsed to the plaintiff in error for money then advanced by the latter to said Williams. The note was made at New Orleans, in the State of Louisiana, where Williams and his wife reside. The property sought to be charged with the debt is land situated in Coahoma County, and is the separate estate of Mrs. Williams, under a devise made to her by her sister, Mrs. McGuire, who died in 1863. By her will she provided as follows: "My whole estate, real and personal, shall go to my sisters, Ellen Mayes, wife of R. B. Mayes, and Louisa Williams, the wife of John Williams, for and during their natural lives; and this bequest is to their sole and separate use, in which their husbands respectively shall have no right or interest." The will then proceeds to dispose of the remainder, after the termination of the life estate, to the children of the two devisees.

The object of the bill is to enforce collection of this note out of the land of Mrs. Williams, devised under this will; and the position of the complainant is, that Mrs. Williams holds this property as her separate estate by virtue of the will alone, and unaffected by the statutes of this State on the subject of the property of married women; and that the power of Mrs. Williams to charge this separate estate is to be determined, not by the provisions of those statutes, but by the general principles of equity in relation to the separate estates of *femes covert*, held under settlements, or other instruments. On the other hand, it is contended that the estate devised by the will is a legal estate, and the wife's power over it, in the absence of any specified grant of larger powers in the will, must be regulated by the statutes alone; and that the doctrines of courts of equity in relation to the separate property of married women are applicable alone to equitable estates.

It has heretofore been settled in this State that the statutes on the subject of the property of married women do not fix and regulate the powers of *femes covert* as to equitable separate estates held by them. *Musson v. Trigg*, 51 Miss. 172; *Doty v. Mitchell*, 9 S. & M. 435; *Montgomery v. Agricultural Bank*, 10 S. & M. 566; *Andrews v. Jones*, 32 Miss. 274; *Block*

v. *Cross*, 36 Miss. 549. We think it equally clear that the same rule should apply when the instrument creating the separate estate fails to appoint a trustee for the wife, whereby her estate is legal, and not equitable. Prior to the enactment of the statute protecting married women in their property, this will would have vested in Mrs. Williams a separate estate to her sole use, and free from the control of her husband. And under the rules of the Chancery Court in England, recognized by the latest cases in this State, the wife would have had the power of charging her estate, as if she had been a *feme sole*. *Block v. Cross*, 36 Miss. 549; *Garrett v. Dabney*, 25 Miss. 335; *Musson v. Trigg*, 51 Miss. 172; *Levy v. Darden*, 38 Miss. 57. The statute was designed, not to restrict, but to enlarge the rights and powers of married women as to property owned by them at the time of their marriage, or subsequently acquired. It secured her property to the wife by cutting off the marital rights of her husband, as they existed at common law. It was designed to operate only when, by the terms or mode of the acquisition of property by the wife, the husband would, as husband, acquire either the entire or a partial interest in it; and as to that property, to fix and secure the rights of the wife and her dominion over it. It was no part of the purpose of the statute to interfere with the recognized power of the wife to acquire and hold a separate estate under instruments creating it according to the rules then recognized by courts of equity. As to such separate estate, the statute is silent, and left the wife's interest to be fixed and regulated according to the terms of the instrument under which she claimed.

The will of Mrs. McGuire secures to Mrs. Williams a separate estate, which a court of equity would recognize and protect if our statutes on the subject had never been passed. In that case she would have had the power to charge the estate by her contracts, according to the rules which courts of equity had recognized and established in relation to such estates. The fact that there is no trustee appointed to hold the legal title would have made no difference. A court of chancery would have treated the husband as trustee (*Kenley v. Kenley*, 2 How. 751), and, at all events, would secure her the rights

intended by the testatrix. That the statutes of the State have enlarged her ability to take the legal title can make no difference. To hold that it would diminish her rights and powers would be to make the statute work an injury instead of a benefit to the wife. These views are in accordance with the opinions of the Supreme Court of Alabama. *Pickens v. Oliver*, 29 Ala. 528; *Cannon v. Turner*, 32 Ala. 483.

There is nothing in the statute prohibiting these settlements to the separate use of the wife. On the contrary, the plain intent of the statute is to secure her a separate estate where the instrument under which she derives title would not without its aid produce that effect. If it be held that the statute intended to regulate her rights when there is a settlement securing her a separate estate, it would in effect destroy her capacity to take under a settlement, there being nothing, in that view, which could be regulated by such an instrument. There is as little foundation for the view that the statute intended to regulate her power of disposition, when the instrument creating the separate estate failed to point out any specific mode of alienation; for under the later cases in this State no mode of disposition is necessary to be specified in the settlement, the power of disposition being that of a *feme sole*, and resulting not from an express grant of it *eo nomine*, but from the fact of ownership.

But it is said that the powers of the wife as to her separate estate were only conceded when the estate was equitable. We do not perceive the force of the distinction. The wife's power of disposition relates to her ownership, not to the nature of her title, and it is not seen how her power would be diminished by the fact that she had a complete legal title and full ownership instead of a mere equity. The inquiry on this point is as to the ownership of a separate estate by the wife, not as to the nature of the title, whether legal or equitable. When she has ownership, then, as an incident to it, she has the *jus disponendi*. She is never obliged to look to the statute for her power to contract and charge her estate except when she must look to it for her title. Here the wife need not refer to the statute. The devise is to her sole and separate use, in which her "husband shall have no right or interest." The

words employed not only indicate her separate right, but exclude all right or interest in the husband. All his rights, of whatever nature, including his right of management and control, are expressly excluded.

It is next insisted that by the law of Louisiana the promissory note of the wife, made as surety for her husband, is void for want of the capacity of the wife to enter into such a contract, and that, being void by the *lex loci contractus*, it is void everywhere. This position is true, if the giving of the note has no other effect than what it purports to have on its face, viz., a personal obligation of the wife. But it is charged in the bill and admitted by the demurrer, that at the time this note was made in Louisiana the wife had a separate estate in realty, situated in this State, and that she contracted with reference to this separate estate, and intended to charge it by the promissory note in controversy. Whether this purpose can be carried out with reference to realty here, notwithstanding the fact that the note is void by the law of Louisiana, is the question presented for our consideration. The note, if made here, would be equally void by our laws to bind the wife personally ; yet, notwithstanding this, it would be held, if made with the intent and purpose alleged in the bill, to be a valid charge against her separate estate situated here.

It is generally true that the capacity of a married woman to make a contract will be determined by the law of her domicile ; but this is not the rule when her contract relates to her estate in realty, situated in another jurisdiction. Judge Story says : "The general principle of the common law is that the laws of the place where such [immovable] property is situate exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. The title, therefore, to real property can be acquired, passed, and lost only according to the *lex rei sitæ*." Story Conf. Laws, § 424. And quoting from Sir William Grant : "The validity of every disposition of real estate must depend upon the law of the country in which that estate is situated ;" he says : "The same rule would also seem equally to apply to express liens and to implied liens upon immovable estate." Mr. Burge, as quoted by Judge Story, in a note to § 445 of the

same work, says: "The power to alienate immovable property by contract was a quality impressed on the property; that the law from which it was derived, or by which it is regulated, was a real law; and that the existence of this power and the validity of its exercise must be decided by the law of the country in which the property was situated." And it is said by a learned author: "No sovereignty can permit the intrusion on its soil of a foreign law. Such a law may be accepted by comity in cases in which a contested issue, the law applicable to which is foreign, comes up for determination in a home court. But the imposition of any other law than the *lex rei sitæ* as to property, would be to give foreign subjects and foreign laws an absolute control, unchecked by any discretion of the home courts, over a subject-matter essential not merely to the independence, but the vitality of the state. . . . The mischief is cured by the adoption of the rule *lex rei sitæ regit*; whoever may be the owner, or wherever the contract was made, the law of the land reigns. No other law, either as to the transfer or control of the property, is to intrude." Wharton Conf. Laws, §§ 278, 280. These rules apply to marital rights in realty. Judge Story, after speaking of the rights of husband and wife as to personal property situated beyond the matrimonial domicile, says: "But real or immovable property ought to be left to be adjudged by the *lex rei sitæ* as not within the reach of any extra-territorial law"; and in *Vertner v. Humphreys*, 14 S. & M. 130, 143, this court said that: "As to immovable property, the law of the place where it is situated fixes the rights of husband and wife in it."

The application of these principles will furnish a safe solution of the question under consideration. The capacity of Mrs. Williams to take this property, and her rights and powers over it, are derived from and regulated by the law of this State. Her power of disposition and dealing with it are, by our laws, impressed on the property itself. As to none of these things has the law of Louisiana the slightest influence. If she had made a contract expressly disposing of this property, it will not be denied that, though void by the laws of Louisiana, either for her want of capacity to act, or the want of the observances of the forms and solemnities prescribed by

those laws, yet, if valid by the law of this State, it would have been good. The contract here is not strictly of that character, yet the making of it is the exercise of the power of the wife to dispose of her estate; for whenever that power is denied, the power to charge it with her debts is denied also, and the charge can only be made effectual by the actual or threatened alienation of the estate, under a decree of the Chancery Court. The charging of her separate estate for the payment of money does not pass any actual interest in the land, but it is the first and essential step for a judicial disposition of the estate to satisfy the charge, and the exercise of a power of administration and control over it, which, as we have seen, is governed solely by the *lex rei sitæ*. To show that this is its true nature, we have only to suppose that, by the law of Louisiana, the note was a charge on her realty situated there, and was not by our law a charge on the realty situated here. In such a case, it would be evident that an attempt to enforce it here against her real estate could not succeed. If success could attend such an effort, then the several rights and powers of husband and wife, as to realty, would not be fixed and governed by the laws of the *situs*; and the act of a wife, done in a foreign State, would have the effect of disposing of her realty here, contrary to our laws.

But there is no real conflict between the laws of Louisiana and Mississippi in reference to the contract. By both laws the note is void for what it purports to be on its face, — a personal obligation of the wife; and it is void for the same reason in both, viz., the personal incapacity of the wife. The difference between the two laws is as to the effect on the real property of the wife in the respective jurisdictions of the two States, and as to which, as we have above seen, the law of the State in which the realty is situated is the exclusive test. If the note had not been void by our laws, as the personal obligation of the wife, we should nevertheless, out of comity to a sister State, adjudge it void to that extent, if attempted to be enforced here; but the principle of comity does not require a State to regard the laws of any other State, so far as they may affect contracts in relation to real estate situated in the former State.

*Decree reversed, demurrer overruled and cause remanded.* ✓

## T. T. ENOCHS v. F. L. HARRELSON ET AL.

57	465
71	37

1. **BILL OF REVIEW.** *Defects reached thereby. Errors of record.*  
Under our system, on a bill of review for error apparent on the face of the decree, the court may examine all the pleadings and proceedings of record, but not the evidence.
2. **SAME.** *Defence. Demurrer. Plea.*  
The proper defence to such a bill is a demurrer, which, if the decree sought to be reviewed is not fairly stated in the bill, may be accompanied by a plea thereof.
3. **SAME.** *Matter of defence outside the record. How availed of.*  
Ordinarily the only defence to such a bill is *in nullo erratum est*, but if there is any matter beyond the decree available as a defence, it should be pleaded.
4. **SAME.** *Cross bill. Independent equity.*  
A cross bill, setting up an alleged equity, independent of that claimed in the original bill, is inadmissible as a mode of defence to a bill of review.
5. **SAME.** *Practice when decree vacated. New decrees.*  
If the bill is sustained and the enrolment opened on the review, that decree should be rendered which is proper on the whole cause, considered as if heard for the first time.
6. **SAME.** *Rehearing. When allowed.*  
If the error goes to the complainant's right to maintain his bill, it is proper to reform the decree at once; but if that is not the case, and a party seeks a rehearing, it should be allowed, if sufficient reason is shown therefor.
7. **SAME.** *Error apparent.*  
If land is subjected by the decree to a vendor's lien, which the bill shows did not exist thereon, that is error apparent, for which a bill of review is maintainable.
8. **SAME.** *Cross bill. Estates of decedents. Chancery jurisdiction.*  
The land cannot be charged in such case, by a cross bill to the bill of review, with the note for the purchase-money, on the allegation that it is the only debt of the vendee, who died insolvent. *Hargrove v. Baskin*, 50 Miss. 194.
9. **SAME.** *Answer. Confession of error. Defect.*  
An answer to such bill of review, admitting the error which it assigns, entitles the complainant therein to a vacation of the decree.
10. **SAME.** *Practice. New decree. Rehearing.*  
If, then, there is no application for a rehearing, or to vary the original case, the court may render the decree which should have been rendered on the first hearing.

11. ORIGINAL BILL. *Infant. Impeaching decree.*

An infant may, by original bill, impeach a decree against him for error apparent. *Sledge v. Boone, ante, 222.*

APPEAL from the Chancery Court of Calhoun County.

Hon. A. B. FLY, Chancellor.

The appellees, who are minors, by their guardian, filed this bill, against the appellant and another, to review a chancery proceeding, and vacate the decree and sale thereunder of land which they inherited, upon the allegation that the defendants, confederating to defraud them, filed a bill setting up a pretended lien upon the land, and, without proper proceedings, obtained the decree under which the appellant purchased. The exhibit discloses a bill, filed by the appellant, as assignee of a note made by their ancestor, and the payee of the note, to foreclose an alleged vendor's lien, followed by appropriate process and proceedings, and culminating in a final decree, report of sale, and confirmation by the court. The appellant answered, admitting the errors alleged in the bill to be apparent on the face of the exhibit, and, making his answer a cross bill, alleged that he purchased the land in good faith, paying the purchase-money which the commissioner applied to satisfaction of the note, the only debt owing by the debtor, who was insolvent at his death, and asked that the purchase-money so paid, or the note, be declared a charge upon the land. The appellees demurred to the cross bill. The case then coming on to be heard, a decree was made, vacating the decree and sale, and dismissing the original bill, sustaining the demurrer to the cross bill, which was also dismissed, and awarding costs in favor of the complainants in the bill of review.

*Nugent & McWillie*, for the appellant.

1. The established doctrine is, that the court looks only to the face of the decree to ascertain errors of law apparent; in any event, it can go no further than to inspect the bill. If the rule is restricted, this bill of review should have been dismissed at the hearing; if extended, the case does not show error apparent in the sense necessary to warrant vacating the decree. It may be conceded that the decree was erroneous, without affecting the question. *Vaughan v. Cutrer*, 49 Miss. 782. Error apparent requires no investigation.



When, on looking at the decree sought to be reviewed, it shows only a possible error, no bill of review will lie, but the remedy is by appeal or writ of error. If the decree is correct on its face, and is only explainable so as to show error by a reference to the pleadings, the error is not apparent. Errors and irregularities will not warrant such practice as that in this case, when the remedy by appeal is so easy. Story Eq. Pl. §§ 407, 408, and notes. The payee of the note could sue in a court of law: can he not join with the beneficial owner in a chancery proceeding to enforce the lien? *Pitts v. Parker*, 44 Miss. 247; *Cotten v. McGehee*, 54 Miss. 510. If that is error, it is, at all events, not error apparent.

2. The vendee was, however, dead, his estate was insolvent, and this note was the only claim against it. It was, therefore, a charge upon the land, and whether we regard the appellant as the original holder of the note, or as subrogated to the rights of the holder by the application of his money paid at the sale to the satisfaction thereof, he is equally entitled to the statutory charge on the land. By virtue of the Act of 1870, fixing the jurisdiction of the Chancery Courts (Acts 1870, pp. 46, 47, 54, 55, 57), they are vested with the powers of the former Probate Courts, and authorized to hear and determine all demands against the estates of deceased persons. If the decedent left nothing but this land to pay his debts, cannot the Chancery Court, without the intervention of an administrator, entertain a creditor's bill to have it sold?

3. The cross bill in the case should have been allowed, or the decree on the bill of review so limited as not to prejudice the creditor's right. The final decree alone could have been set aside, leaving the sale to stand or fall on its merits, and the bill as a pending suit for the recovery of the debt. If it was not in proper form, amendment could be made to suit the exigency. If the sale was sought to be set aside, it might be done by appropriate allegations, but in no event could the original bill, filed many years before, be dismissed. The rights of the parties should have been left *in statu quo*, after reversing the decree. Story Eq. Pl. § 420.

A. T. Roane, on the same side.

No counsel for the appellees.

CAMPBELL, J., delivered the opinion of the court.

A bill of review for error apparent on the face of the decree is in the nature of an assignment of errors, on writ of error, and the error must appear on the face of the pleadings, proceedings, and decree, without reference to the evidence. The propriety of the decree, as not justified by the evidence, cannot be questioned by bill of review, which is not a substitute for an appeal from the decree. The question presented by a bill of review for error apparent is, whether the decree rendered is supported, taking everything as stated by the record, excluding the evidence, to be true. Under our system, all the pleadings, proceedings of record, and decree may be looked to on a bill of review for error apparent. The evidence cannot be. The authorities to this effect are numerous, and need not be cited. They all agree.

A demurrer is the proper and usual defence to a bill of review for error apparent, for that amounts to an assertion that there is no error in the decree; or, if the decree sought to be reviewed is not fairly stated in the bill of review, a plea of the decree, and a demurrer against opening the enrolment, is the proper defence. Story Eq. Pl. §§ 634, 838; 2 Dan. Ch. Prac. 1588; Lubé's Eq. Pl. 336; 2 Smith Ch. Prac. 56. Ordinarily, there is no answer to such a bill of review, except *in nullo erratum est*. *Cook v. Bamfield*, 3 Swanst. 607; Lubé's Eq. Pl. 337; Mitford & Tyler's Pl. & Prac. 298. But if there be any matter beyond the decree available as a defence to the bill of review, that matter should be pleaded. *Hartwell v. Townsend*, 2 Bro. Parl. 107; *Webb v. Pell*, 3 Paige, 368; *Turner v. Berry*, 3 Gilman, 541; Story Eq. Pl. § 833; 2 Dan. Ch. Prac. 1588; Lubé's Eq. Pl. 336. As the demurrer presents an issue of law only, the effect of the decree overruling it is to open the decree reviewed. *Cook v. Bamfield*, *ubi supra*; *Guerry v. Perryman*, 12 Ga. 14. Upon opening the enrolment of the decree, as it is called in technical language, by maintaining a bill of review for error apparent, the parties are at liberty to proceed as at a rehearing, it is said. *Catterall v. Purchase*, 1 Atk. 290; *Kenner v. Smith*, 8 Yerger, 206; *Payne v. Beech*, 2 Tenn. Ch. 708; Lubé's Eq. Pl. 336. But upon overruling a demurrer in such case, the

decree may be reversed without any further hearing, and the decree, which should have been rendered at first, may be rendered without further proceedings. Ordinarily, this is proper, for the consideration of the bill of review is a consideration of the original cause, upon the specific errors assigned by the bill of review; and, unless there be some reason against it, the court hearing the bill of review proceeds at once to render the proper decree in the original cause. 2 Dan. Ch. Prac. 1584; *Cook v. Bamfield*, 3 Swanst. 607; *Guerry v. Perryman*, 12 Ga. 14. But when the enrolment is opened, the court may proceed as at a rehearing, the cause being equally open. Authorities cited above.

If the justice of the cause requires that it should be reheard, that course should be pursued. If the demurrer be overruled, the question arises, What decree shall be made? The answer is, Such decree as is proper on the whole cause. The enrolment being opened on the *review*, that decree should be rendered which is proper on the whole cause, considered as if heard for the first time. The decree being *reviewed*, the cause stands for hearing as if a decree had not been made, and the next inquiry is, Shall it be *reversed*, and what decree shall be made? Lubé's Eq. Pl. 386. Manifestly, when the enrolment is opened for error apparent, that decree should be made which should have been made at first, for the court, having full control of the cause as if it had never been heard before, should make the proper disposition of it. If the error apparent goes to the right of the complainant to maintain his bill, it is proper to proceed at once, without a rehearing, to reform the decree. *Carey v. Giles*, 10 Ga. 9. But where this is not the case, and a rehearing is asked for, it should be allowed, if sufficient reason is shown therefor. Lord Hardwicke said: "After the demurrer [to a bill of review for error apparent] is overruled, the plaintiffs are at liberty to read bill or answer, or any other evidence, as at a rehearing, the cause being now equally open." *Catterall v. Purchase*, 1 Atk. 290. See *Kenner v. Smith*, 8 Yerger, 206.

Applying the above stated rules to this case, we conclude that the decree in the original cause is erroneous on its face, because it is not warranted by the case made by the bill, and

that this is an error apparent, for which a bill of review is maintainable. The bill shows that there was no lien on the land sought to be charged with it, and which was charged with it by the decree. *Lindsey v. Bates*, 42 Miss. 397; *Pitts v. Parker* 44 Miss. 247. This is error apparent. *Goodhue v. Churchman*, 1 Barb. Ch. 596; *Eaton v. Dickinson*, 3 Sneed, 397; *Randall v. Payne*, 1 Tenn. Ch. 137; *Moore v. Huntington*, 17 Wall. 417; *Stark v. Mercer*, 3 How. 377; *James v. Fisk*, 9 S. & M. 144; Story Eq. Pl. § 405.

The defendants to the bill of review, who were complainants in the original bill, instead of demurring to the bill of review, or pleading the decree, answered the bill of review, admitting the errors in the decree it assigned, and added to this answer a cross bill, setting up an alleged equity independent of that claimed in the original bill. The demurrer to this cross bill was properly sustained, both because it was inadmissible as a mode of defence to the bill of review, and because it showed no right to charge the land. *Hargrove v. Baskin*, 50 Miss. 194. The admission, by the answer, of the errors assigned by the bill of review entitled the complainants therein to a vacation of the decree. The cause then stood as if it had not been heard, and if a rehearing was had upon the pleadings and evidence, the result must have been a dismissal of the original bill, which, according to the view expressed above, did not state a case entitling the complainants to a decree. The record does not inform us whether there was a formal rehearing of the cause or not; but as the answer, admitting the errors assigned by the bill of review, justified a vacation of the decree, and no application was made by the complainants in the original bill for a rehearing, or in any manner to vary the state of the cause, as existing when the decree, properly vacated, was made, we conclude that the court rightly proceeded to render the decree which should have been rendered on the first hearing.

This case was treated in the court below, and here, by counsel as a strict bill of review for error apparent on the face of the decree, and we have discussed it accordingly. But as the complainants in the bill which attacks the decree are minors, complaining of an improper decree made against them, they

were entitled to impeach the decree for error apparent by original bill, as held in *Sledge v. Boone*, ante, 222; *Livingston v. Noe*, 1 Lea (Tenn.), 55. Whether the bill be viewed as of the one kind or the other, the result is the same, and the decree of the Chancellor is

*Affirmed.*

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H. A. FLYNT ET AL. v. NANCY HUBBARD.

1. RESULTING TRUST. *Purchase with another's money.*

If a son, to whom his mother has entrusted money to complete the purchase of a tract of land for her, takes title in his own name, and then exchanges it for other land, with her consent, he holds the newly acquired land as trustee for her benefit.

2. SAME. *Mortgage for value without notice.*

A mortgage executed by the son while holding only a title-bond to the latter land, but after the consideration of the exchange is paid, takes precedence of the resulting trust, if he receives a deed before his mother gives notice of her claim.

APPEAL from the Chancery Court of Tishomingo County.

Hon. L. HAUGHTON, Chancellor.

*Whitfield & Young*, for the appellants.

1. The mother's money was not used at the time of the purchase, but afterwards, to complete it, and no trust results. *Bowman v. O'Reilly*, 31 Miss. 261; *Gee v. Gee*, 32 Miss. 190. The same rule prevails although there was only a contract for the purchase of the land. *Conner v. Lewis*, 16 Maine, 268. The trust must result either by virtue of the son's agency or his contract to convey to his mother, and, as both rested in parol, the trust fails in either case by virtue of the Statute of Frauds. Code 1871, §§ 2892, 2896, 2897; *Miazza v. Yerger*, 53 Miss. 139. Under the executory contract of purchase, the vendor held the legal title to the land in trust for the son, to secure the balance of the purchase-money. *Pitts v. Parker*, 44 Miss. 247; *Strickland v. Kirk*, 51 Miss. 795. And the son could not assign his interest to his mother except in writing. Code 1871, § 2897.

2. At all events, the title of Flynt became perfect before he had notice of the complainant's claim, by the execution of a deed from the vendor to the son and the extinction of the title-bond. The mother, by allowing her son to have apparent ownership, forfeited her rights. *Bellas v. M'Carty*, 10 Watts, 13. The innocent purchaser for value is protected (Code 1871, §§ 2284, 2307), and takes precedence of the beneficiary of the resulting trust, whereof he had no notice. *Rhines v. Baird*, 41 Penn. St. 256. It was owing to the mother's negligence that the appellant gave credit on the faith of the son's title, and, of the two innocent parties, she must suffer who put it in his power to deceive.

*Reynolds & Reynolds*, for the appellee.

By the agent's disregard of duty in buying land with his principal's money, and taking the title in his own name, he became trustee of a resulting trust. *Gillenwaters v. Miller*, 49 Miss. 150; *Pressly v. Ellis*, 48 Miss. 574; 1 Story Eq. Jur. §§ 316, 463, 465. The principle, which is without exception, is strictly applicable to the facts of this case. Flynt's claim, which is that of an innocent purchaser, cannot be sustained, because the son had no title until long after the mortgage. His possession could not extend his title. *Perkins v. Swank*, 43 Miss. 349. The question of notice has, under the Statute of Frauds, no application to the case. *Kelly v. Mills*, 41 Miss. 267.

*M. Green*, on the same side.

A resulting trust was created by this transaction. Perry on Trusts, §§ 126, 127. The case falls under the latter, not the former section. Flynt is not an innocent purchaser. The son had no title when he made the mortgage. By the vesting of title in him, the trust arose *eo instanti*. *Porter v. Caspar*, 54 Miss. 359. In cases of fraud, the court will relieve notwithstanding the Statute of Frauds. Browne on the Statute of Frauds, §§ 437, 438. *Miazza v. Yerger*, 53 Miss. 139, is essentially overruled by subsequent decisions. The son's title was for the purposes of the trust, and at no time did he have a title not subject thereto. Flynt was charged with notice of all prior equities. *Wailes v. Cooper*, 24 Miss. 208. He was not a *bona fide* purchaser of the legal title; nor

could his title be perfected by the son's subsequently acquiring the legal title, both because of the registry acts and because he knowingly bought an equity only. It was no case of mistake, but he designed to purchase, not the legal title, but an equity.

CHALMERS, J., delivered the opinion of the court.

This is a bill filed by Mrs. Nancy Hubbard against the heirs of her deceased son, Green Hubbard, and against his mortgagee, for the purpose of asserting in her own favor a resulting trust in a tract of land of which her son died seized, and which during his life he had mortgaged to one Flynt. The mother had entrusted to the son the money with which to complete the purchase of a half interest in a tract of land, known in the pleadings as the Tyler tract, the title to which was to be taken in her name. In violation of the trust, and without the knowledge of the mother, the title was taken by the son in his own name. Afterwards, with her consent, he exchanged the half interest in the Tyler tract for the tract in controversy, known as the Thomas place, but, in making the exchange, received only a title-bond to the latter place, though the consideration for the exchange was paid in full. The title-bond was taken, as the deed to the former place had been, in the son's name, and thereafter it was held and occupied by him as his own, nor was it known outside the family that the mother had any claim upon it. Several years after he had taken possession, he borrowed from Flynt five hundred dollars, and to secure it executed a mortgage upon the land. Flynt had no notice of the mother's claim, and supposed that the son had a deed. The son did receive a deed some years afterwards, about a month before his death, and it was not until after that event that this suit was brought and the mother's claim for the first time disclosed. It is insisted for her, that, inasmuch as, at the date of Flynt's mortgage, Green Hubbard held only a title-bond to the land embraced in it, Flynt acquired a lien only on an equity, and that his equity must therefore be held subordinate to the prior equity of the complainant.

It is well settled that the purchaser of an equity is bound by all prior equities, though he has paid value and acquired

his title in the utmost good faith; but it is equally well settled, at least by the great weight of authority, that under such circumstances he can defeat the prior equities by a subsequent acquisition of the legal title. 2 Eq. Lead. Cas. (4th Am. ed.), part 1, 47, and authorities cited. In this case Green Hubbard, who, at the date of the mortgage to Flynt, by reason of his complete payment of the purchase-money, was entitled, as against his vendor, to a conveyance of the legal title, obtained a deed before his death, and before the complainant had given any notice of her claim. This acquisition of the legal title inured, of course, to the benefit of his mortgagee, and converted that which had been a conveyance of an equity into a conveyance of the legal title, and thereby defeated the prior secret equity of the complainant, so far as the rights of the mortgagee are concerned. Mrs. Hubbard, therefore, is entitled to a decree, establishing a resulting trust against the heirs of her son, but not against his mortgagee.

*Decree reversed and decree here.*



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### HILLIARD FIELD v. THE STATE.

1. **HOMICIDE.** *Poisoning. Evidence. Res gestæ. Declarations of victim.*  
The statements of a poisoned person as to his symptoms, existing at the time he speaks, are admissible in evidence on the trial of the prisoner, but his narrative of what he drank an hour before cannot be proved.
2. **EVIDENCE.** *Declarations of a person hurt. Interval after injury.*  
Declarations of an injured person are usually incompetent, unless simultaneous with the particular event, but have been admitted in evidence when made very shortly thereafter to the first person offering assistance or inquiring, and before opportunity or motive for fabrication.

ERROR to the Circuit Court of Monroe County.

Hon. J. A. GREEN, Judge.

*Houston & Reynolds* and *F. M. Rogers*, for the plaintiff in error.



The declarations about eating the bread and drinking the coffee were incompetent, and their admission led to the verdict. In that coffee the chemist found the arsenic, and the statement made during the wife's sickness, that she drank it an hour before, indicated that as the cause of her death. "On fire inside" was a symptom of arsenical poisoning. The declarations of the deceased as to the symptoms and effects of the malady from which she was suffering may be admissible, but the statement as to what she had eaten is not within the rule, but is hearsay. *Fondren v. Durfee*, 39 Miss. 324; *Grangers' Ins. Co. v. Brown*, ante, 308; 1 Wharton Evid. § 268.

*T. C. Catchings*, Attorney General, for the State.

The statements of the deceased were properly admitted. In the language of the court, in *Fondren v. Durfee*, 39 Miss. 324, they were made to one who was acting for her good and interested in her welfare. He stood in the relation which called for truth and confidence on her part. When the nature of a person's sickness is in question, his declarations to his physician or other attendant, during such sickness, may be received. 1 Wharton Evid. § 268.

CHALMERS, J., delivered the opinion of the court.

The plaintiff in error has been convicted of the murder of his wife by poisoning, and sentenced to be hanged. The principal error of law assigned as ground for reversal of the judgment arises upon the competency of certain statements made by the wife, which were admitted as part of the *res gestæ*. About eight o'clock in the morning, the wife, who had been up to that time in good health, was discovered in her room, suffering intensely and vomiting violently. The alarm was at once given, and the husband, who was in his field at work, was summoned. Upon reaching the house, he was observed to empty a tin bucket of the coffee contained in it, and fill it with water. The wife continuing to grow worse, the manager of the plantation upon which the parties were laborers was sent to for medicines and assistance. He came with medicine, which he administered to the sick woman. In response to his inquiries as to her feelings and symptoms, she said that she felt as if she was on fire inside, and being asked what she had

eaten, replied nothing, except some bread and coffee at breakfast. She died the next day, and a subsequent analysis of some minute particles which clung to the sides of the coffee-pot, which the plaintiff in error had first emptied and then filled with water, developed arsenic in considerable quantities.

It is conceded that the answer of the woman as to her feelings and symptoms as embodied in the declaration — that she felt as if on fire inside — were admissible in evidence, but it is insisted that her statement as to having drunk the coffee was not. We think the objection is well taken, and that the two answers serve well to illustrate the true test to be applied in determining the admissibility of this class of evidence. The groans, exclamations, or statements of a sick or injured person, expressive or explanatory of his then present feelings or symptoms, whether made to a physician or other person, are receivable in evidence, because they are regarded as illustrative of the symptoms; and where the symptoms constitute the fact to be determined, the exclamations and explanations uttered while they are suffered are properly treated as a part of the *res gestæ*. It being competent for the State, in determining whether the deceased came to her death in this case by poisoning, to prove by those who attended her the symptoms which she exhibited during her sickness, it was admissible to prove her statements and expressions relative to those symptoms, made and uttered while they were being endured. *Fondren v. Durfee*, 39 Miss. 324. But if the statements are narrative in form, relate to the past rather than the present, and detail the causes which have produced the symptoms rather than the symptoms themselves, they are inadmissible, whether made to a physician or to a non-professional attendant. *Grangers' Ins. Co. v. Brown*, ante, 308, and authorities cited; *Denton v. State*, 1 Swan, 279. So also words spoken by either party during a combat are admissible as parts of the *res gestæ*, because they serve to illustrate their acts, and being simultaneous in point of time, they become in truth a part of the acts; but when the combat has ceased, and the parties have withdrawn from the presence of each other, the account which one may give of what occurred during the encounter is not admissible in evidence against the other. Slight depart-

ures have sometimes been made from this rule, and statements, neither simultaneous nor contemporaneous with the principal event, have been admitted as part of the *res gestæ*. Thus, in *Thompson v. Trevanion*, Skinner, 402, which was an action for injuries to the wife of the plaintiff, the court "allowed that what the wife said immediately upon the hurt received, and before that she had time to devise or contrive anything for her own advantage might be given in evidence." So in *Rex v. Foster*, 6 Car. & P. 825, a man who had been run over by a cab was heard to groan, by one who was standing near by, but not looking in that direction. The bystander ran to him and asked him what was the matter, and the reply made was admitted in evidence in a prosecution of the driver of the cab. In *Commonwealth v. M'Pike*, 8 Cush. 181, the statement of a bleeding woman, that she had been stabbed by her husband, was admitted in evidence against him, though time enough had elapsed from the reception of the injury for the woman to run up stairs, and for the person to whom the statement was made to go out and fetch a watchman. The exact time is not given. The authority of this case is much weakened, if not destroyed, by subsequent adjudications of the same court. *Lund v. Tyngsborough*, 9 Cush. 86; *Chapin v. Marlborough*, 9 Gray, 244; *Commonwealth v. Densmore*, 12 Allen, 535. In *People v. Vernon*, 35 Cal. 50, the statement of the person injured, made within three quarters of a minute after receiving the fatal shot, to the first person who reached him, was received. So, too, in *Mitchum v. State*, 11 Ga. 615, a statement made within one minute after the shot, to a person who heard it, and towards whom the wounded man ran instantly upon receiving it, was admitted in evidence. In *Ins. Co. v. Mosley*, 8 Wall. 397, statements made a longer time after the reception of the injury were admitted, though the exact time is not given. It probably did not exceed ten or fifteen minutes, and the statements were made to the first persons whom the injured man reached. The case was decided by a divided court, and we are by no means sure that the opinion of the minority is not the sounder, both upon principle and authority. The exception to the rule that declarations, in order to be admissible, must be simultaneous or contempo-

aneous with the principal event, as deduced from these and similar cases, seems to rest upon the idea that the interval of time has been very brief, that they are made to the person first proffering assistance or making inquiry, and that there has been neither opportunity nor motive for fabricating a false story.

The case at bar does not come up to these requirements. The time which elapsed between the drinking of the coffee by the deceased, and her statements with regard to it, is not fixed, but we gather from the record that about one hour probably intervened. Several persons had reached her and undertaken to relieve her before the manager of the plantation was sent for, and it is reasonable to suppose that surmises and suggestions had been made by them, as they gathered around her bedside, with reference to the nature and cause of her malady. If, under these circumstances, she had stated that her husband had put a powder in the coffee, and given it to her to drink, it would hardly be contended that this declaration could have been used against him in a subsequent prosecution for her murder. That she stopped short of this, and stated only that she had drunk the coffee, does not, so far as we can see, affect the result. We think the testimony was improperly admitted, and for this error we reverse the judgment, and award a new trial.

*Judgment accordingly.*

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J. H. THOMPSON ET AL. v. H. H. FURR ET AL.

1. FRAUDULENT CONVEYANCE. *Preference. Reservation to debtor.*  
Security for a pre-existing indebtedness is void as to creditors, if it reserves an advantage inconsistent with its avowed purpose, or an unusual indulgence to the debtor, although the secured creditor has no notice of the fraudulent intent.
2. SAME. *Notice to grantee. Valuable consideration.*  
A grantee who accepts such a conveyance with knowledge of its character, or has reasonable ground to suspect it, forfeits its advantages, although the consideration may be meritorious.

8. SAME. *Preference. Notice of fraud.*

A creditor cannot, as against other existing creditors, accept as collateral security for a pre-existing debt the benefit of the debtor's fraudulent conveyance to a third person, if he has reason to suspect its character.

APPEAL from the Chancery Court of Lincoln County.

Hon. THOMAS Y. BERRY, Chancellor.

*Benjamin King, Jr.*, for the appellants.

The conveyance to H. H. Furr, and the assignment of his notes for the purchase-money of a half interest in the land, and his contract to convey the other half, were accepted by King for J. H. Thompson & Co., as a security for a valid debt. King and the other members of that firm were not aware that the Bloom debt existed, or that Brewer was in debt to any one. Until some ground for divorce exists, alimony is impossible. It becomes a debt only when awarded by decree. 4 Bac. Abr. 411. Then, owing to the peculiar nature of the claim, a conveyance subsequent to the guilty act of the husband, but prior to such decree, can be vacated at the suit of the wife. This rests, however, on the confidential relations of the parties, and the husband's deed is not avoided on the ground that his wife is a prior creditor. In this case no separation or cause therefor is shown, nor can it be inferred from a casual conversation with a stranger that such a claim was contemplated by the wife. It cannot be held that King's statement as to hearing that Brewer's wife would claim alimony is enough to show that the object was to defraud her of a real claim. Not even her existence or identity is established. The fancied claim of a supposed Mrs. Brewer to alimony is the only demand of which the appellants ever heard, and the only one except the Bloom debt mentioned in the record. Under such circumstances, the security is valid, both because no fraud is shown on Brewer's part, and because, if there had been, neither the appellants nor even Furr knew anything about it. *Marbury v. Brooks*, 7 Wheat. 556; *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268; *Magniac v. Thompson*, 7 Peters, 348. The same doctrine prevails in this State. *Henderson v. Downing*, 24 Miss. 106; *Harper v. Tapley*, 35 Miss. 506; *Kelly v. Mills*, 41 Miss. 267. Mrs. Brewer is not complaining; and, from all

that appears in this case, Bloom & Co. are endeavoring to defeat a debt which she and her husband, now living harmoniously together, unite in desiring to have paid.

*J. A. Brown*, on the same side.

Unless the transaction is avoided by Furr's agreement with Brewer, to reconvey a half interest in the land when the debt was paid, the security is valid. It is, in effect, as King states in his answer, a deed of trust of all the land to secure the appellants' debt. The fact that half the property was to revert to Brewer was a benefit, not an injury to Bloom & Co. If the papers had been joined, it would have made a deed of trust to secure the appellants, with Furr as trustee. In such instruments, after paying the secured debt, the trustee holds for the grantor. The debtor may prefer a creditor, and the preference is not avoided by irregularities in his method. *Savage v. Dowd*, 54 Miss. 728. Nor if the debtor's object was to benefit the appellants to the manifest prejudice of Bloom & Co., and the appellants knew it, would it avoid the preference. *Park v. Bamberger*, 52 Miss. 565. If the conveyance by Brewer had been directly to the appellants, who had executed a defeasance to one half, to operate when the debt was paid, it would have made a mortgage, to overturn which the court must hold that a mortgage consisting of an absolute deed and secret defeasance is void as a security for debt. Such a transaction, however, is perfectly fair. *Carnall v. Duval*, 22 Ark. 186; *Doswell v. Adler*, 28 Ark. 82; *Hill v. Bowman*, 35 Mich. 191; *Crawford v. Kirksey*, 50 Ala. 590. Even if Brewer contrived to defraud, the appellants knew nothing of it, but are innocent. On what ground, then, shall the entire land be taken from them and given to Bloom & Co.? Where is their superior equity? The legal title is in Furr. Under such circumstances the legal title of the trustee will prevail to secure the preferred creditors. *Stover v. Herrington*, 7 Ala. 142; *Governor v. Campbell*, 17 Ala. 566; *Cornish v. Dews*, 18 Ark. 172; *Marbury v. Brooks*, 7 Wheat. 556; *Dudley v. Danforth*, 61 N. Y. 626; *Brooks v. Marbury*, 11 Wheat. 78; *Wilson v. Eifler*, 7 Cold. 81; *Myers v. Kinsie*, 26 Ill. 86. Brewer could have given the preference even if he had been insolvent, which is not shown in this case. *Hollister v. Loud*, 2 Mich. 809.

In fact, he is not shown to have owed any one but Bloom. The alimony is a mere pretence, without even a cause for divorce shown. If there be a Mrs. Brewer, she is no creditor, unless the court is prepared to hold that every deed of a married man is void as against his wife. *Chase v. Chase*, 105 Mass. 385; *Bouslough v. Bouslough*, 68 Penn. St. 495; *Draper v. Draper*, 68 Ill. 17; *Morrison v. Morrison*, 49 N. H. 69; *Feigley v. Feigley*, 7 Md. 587; *Frakes v. Brown*, 2 Blackf. 295; *Clagett v. Gibson*, 3 Cranch C. C. 359. Even if the cause for divorce be assumed to exist, the wife's claim is a mere unliquidated demand, not within the statute against fraudulent conveyances. *Hill v. Bowman*, 85 Mich. 191.

*R. H. Thompson*, for the appellees.

1. The appellants' rights spring from a fraudulent conveyance, and one of them had notice that the conveyance of the whole land was coupled with a secret trust that it was to operate as a conveyance of but one half. A deed void in part is void *in toto*. 3 Wait's Actions and Defences, 470; *Harney v. Pack*, 4 S. & M. 229; *Burke v. Murphy*, 27 Miss. 167; *Hyslop v. Clarke*, 14 Johns. 458; *Weeden v. Hawes*, 10 Conn. 50; *Tickner v. Wiswall*, 9 Ala. 805; *Russell v. Winne*, 87 N. Y. 591; *Goodrich v. Downs*, 6 Hill, 438; Bump Fraud. Conv. (2d ed.) 476-478, and authorities cited. Notice to one partner is notice to the firm. *Fitch v. Stamps*, 6 How. 487; Parsons Part. 196, and authorities; Wade on Notice, § 684; *Dabney v. Stidger*, 4 S. & M. 749. King also had actual knowledge that the deed was intended to defraud Mrs. Brewer of her alimony. She was a creditor. Bouvier's Law Dic. title, Creditor; *Shean v. Shay*, 42 Ind. 375; 2 Bish. Marriage and Divorce, § 450. But knowledge of her husband's design to defraud her, in morals and equity, taints the appellant's title, whether she is technically a creditor or not. It was enough to put them on inquiry. And even if they had paid value, they would not have been innocent purchasers. Bump Fraud. Conv. 484. If King was anxious to acquire a lien on the whole land, as he says, why did he only take Furr's obligation to convey? Obviously, the arrangement was not, as he answers, simply to secure the appellants, but was to protect Brewer, and for his advantage.

They could not secure their debt by becoming parties to a scheme of fraud.

2. As the appellants took a security merely, they are not *bona fide* purchasers, and are therefore not protected even if they had no notice. *Union College v. Wheeler*, 61 N. Y. 88; *Sims v. Hammond*, 33 Iowa, 368; *Mason v. Ainsworth*, 58 Ill. 163; *Twitchell v. McMurtrie*, 77 Penn. St. 383. They obtained only the rights in the mortgage which Brewer had, however it may be with the notes. *Faull v. Tinsman*, 36 Penn. St. 108; *Walker v. Johnson*, 13 Ark. 522; *Timms v. Shannon*, 19 Md. 296; *Martin v. Richardson*, 68 N. C. 255; *Ingraham v. Disborough*, 47 N. Y. 421. He who buys an equitable interest takes subject to all equities. However honest and ignorant of fraud the appellants may have been, yet they only acquired Brewer's interest. *Johnston v. Dick*, 27 Miss. 277; *Bank of England v. Tarleton*, 23 Miss. 173; 2 Hovenden on Fraud, 183. The appellants, however, do not occupy the position of innocent purchasers in any sense. No man can be an innocent purchaser of a mortgage who would not be, under the same circumstances, an innocent purchaser of the land, had he bought the land instead of the debt. Had J. H. Thompson & Co. bought the land, the following authorities would test their *bona fides*, and the same measure should now be meted. *Agricultural Bank v. Dorsey*, Freem. Ch. 338; *Upshaw v. Hargrove*, 6 S. & M. 286; *Boon v. Barnes*, 23 Miss. 136; *Rowan v. Adams*, S. & M. Ch. 45.

CHALMERS, J., delivered the opinion of the court.

William B. Brewer, being indebted to J. H. Thompson & Co., went to Benjamin King, a member of that firm, accompanied by H. H. Furr, and stating that he had sold his lands to Furr, and desired, with the notes taken for the deferred payment, to secure his indebtedness to the firm, requested King to prepare the necessary papers, to which request King acceded. The scheme as developed was this: Brewer was to convey, or pretend to convey, to Furr the whole of his land for a nominal consideration of twelve hundred dollars, of which six hundred were to be secured by notes of the purchaser, and six hundred to be



expressed in the deed as having been paid in cash. In reality, no cash was to be paid, and only a half interest in the land was to be sold ; for though the deed was to purport to convey the whole, it was to be accompanied by a secret defeasance, whereby Furr was to obligate himself to reconvey to Brewer a half interest upon demand. The notes for six hundred dollars, which constituted the consideration of the half interest really sold, were to be transferred to J. H. Thompson & Co. as collateral, for the debt due them by Brewer, and were to be protected by a lien reserved in the deed. When the scheme was unfolded to King, he objected that if the defeasance was executed to Brewer, it might be used to defeat the lien of the notes as to one half of the land, and insisted that the notes be allowed to operate as a charge upon the whole land. It was consequently agreed that the defeasance should be executed to King, and Furr accordingly delivered to him an obligation to convey a half interest in the land upon demand, it being understood, of course, that King would not make such demand until the notes transferred to him as collateral were paid, and when he received the conveyance that he would hold as trustee for Brewer.

Bloom & Co. were existing creditors of Brewer at the date of this transaction, and getting wind of it, sued out an attachment, and levied it on the land. Having sustained their attachment, reduced their demand to judgment and bought the land under a *venditioni exponas*, this contest has arisen between them and J. H. Thompson & Co., as to their respective rights. Bloom & Co. insist that the transaction, out of which the notes held by Thompson & Co. grew, was fraudulent, and that the latter, having notice of the fraud, acquired no rights under it which can be interposed to defeat the just demands of creditors. Thompson & Co. insist that it was only an acquisition by them of a security for a valid debt, and that they cannot be affected by any fraud intended towards other creditors, if any such there were. It must have been perfectly manifest to King, when the scheme concocted between Brewer and Furr was disclosed to him, that the design was to mislead and defraud somebody. A deed to the whole land, reciting a consideration of twelve hundred dollars, was to be placed on

record. Six hundred dollars only were to be paid, and a half interest only to pass, the end being accomplished by the contemporaneous delivery of a secret obligation to reconvey the other half. The obvious result and manifest purpose was to secrete and hide out Brewer's continued ownership of one half the land, so as to protect it from the attacks of creditors. King admits that he suspected this, though he did not know that Brewer was in debt except to his wife. He says that either on the day of the transaction or a short time previously, he had heard that Brewer's wife had a claim against him for alimony, and though nothing was said on the subject, he suspected that the scheme was devised in order to defeat her claim. So suspecting, he perfected the negotiation and put it in shape for the sake of protecting the debt due his firm. However innocent of intentional fraud or moral *mala fides* he may have been, with whatever sincerity he may have supposed that he had a right to do this, — and that he did so suppose is apparent from the readiness and frankness with which he details the facts, — the law will not tolerate such a transaction. A creditor has a perfect right to protect his own interests, but in so doing he must not lend himself to any scheme whereby others may be defrauded; and he does this whenever he knowingly accepts the benefits of an arrangement by which others are deceived and misled, and the interests of the debtor thereby improperly protected from the lawful demands of his creditors.

One of the surest tests of a fraudulent conveyance is, that it reserves to the grantor an advantage inconsistent with its avowed purpose, or an unusual indulgence. Whenever this is the case, the grantee who has accepted it, either with express knowledge of its character or reasonable ground to suspect it, forfeits its advantages, no matter how meritorious the consideration he may have paid, or how just the debt protected by it. Especially is this so, when, as in this case, it consists merely in the voluntary reception of a security for a pre-existing indebtedness. In such a case the conveyance would be avoided by the fraudulent intent of the grantor, though the grantee had no notice of it, because, having paid nothing for its acquisition, he is not damnified by its loss. *Farmers' Bank v. Douglass*, 11 S. & M. 469; *Harney v. Pack*, 4 S. & M. 229; *Pope v. Pope*, 40

Miss. 516. In the case at bar there is a union of fraudulent intent on the part of the grantor, of knowledge on the part of the grantees, and of a conveyance to protect a pre-existing debt without the advance of any present consideration. The chancellor rightly decreed it void as to existing creditors.

*Decree affirmed.*

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JAMES SURGET ET AL. v. SAMUEL L. BOYD.

57	485
75	301
57	485
78	787

1. **FRAUDULENT CONVEYANCE.** *Preference to creditors. Badges of fraud.*  
A deed of trust made by a debtor, against whom a suit for a large amount is pending, just before judgment, to secure pre-existing debts due his relatives and friends, is valid, although hastily recorded, where the grantor owns property, before the judgment can be enrolled.
2. **SAME.** *Fictitious debt. Reservation to grantor.*  
Unless such security is a sham never to be enforced, other creditors can vacate it only by showing that the secured debts are simulated or that some benefit is reserved to the grantor.
3. **SAME.** *Security for pre-existing debt. Purchaser for value.*  
Security for a pre-existing debt, without a new consideration, does not, like a purchase for value, cut off secret equities and frauds; but, unless they are shown to exist, the recipient is equally entitled to protection. *Harney v. Pack*, 4 S. & M. 229; *Pope v. Pope*, 40 Miss. 516, and *Perkins v. Swank*, 43 Miss. 349, explained.
4. **CHANCERY PRACTICE.** *Setting for hearing. Answer as evidence.*  
If a complainant sets down the case for hearing on bill and answer, he admits the truth of the answer, so far as it is responsive to the bill, although five months have elapsed since it was filed.

APPEAL from the Chancery Court of Claiborne County.

Hon. THOMAS Y. BERRY, Chancellor.

*Martin & Lanneau*, for the appellants.

By setting the case for hearing, on bill and answers, without proof, the complainant admitted the truth of matters in denial of the charges of fraud, so far as such matters are responsive to the bill, and are not disproved by the exhibits. The bill does not allege that the debts secured are fictitious. The deed of trust, in this case, is not fraudulent on its face. *Har-*

*man v. Hoskins*, 56 Miss. 142. A debtor can prefer a creditor, if the preference is not fraudulent. *Mangum v. Finucane*, 38 Miss. 354. The time when the mortgage is executed is immaterial, nor does it matter that suits are pending against the debtor. Recording the trust-deed before the judgment lien attached was only due diligence in securing a legitimate preference. If a person is indebted to his relatives and friends, no law prevents him from preferring them to his other creditors. Want of a new consideration moving between the parties at the time has no bearing on the case until fraud is established. The case stands on grounds similar to those in *Harman v. Hoskins*, *ubi supra*, and is like the case of *Crawford v. Kirksey*, 55 Ala. 282.

*J. D. Vertner*, on the same side.

There is sufficient consideration, in the granting of further time, to support the deed, *Schumpert v. Dillard*, 55 Miss. 348; and it can be assailed only on the ground of fraud. That charge is not made out by the fact that it was executed pending a suit against the grantor, Bump Fraud. Conv. 218; or by the relationship of the parties, Bump Fraud. Conv. 96; or by the haste in recording it. These are mere badges of fraud, calculated only to throw suspicion on the transaction, and require strict proof of good faith. Bump Fraud. Conv. 76, 78. The answers explain these circumstances, state fully the debts secured, deny all charges of unfairness, and destroy the equity of the bill. On these answers and the bill, the complainant, without proof, set down the case for final hearing, and it must follow that the bill shall be dismissed.

*W. P. Harris*, on the same side.

A debtor has the legal right to prefer one creditor to another, and the creditor has the right to accept the preference. It matters not that the creditors who suffer are prosecuting suits. *Hunt v. Knox*, 34 Miss. 655; *Mangum v. Finucane*, 38 Miss. 354. It is not essential that the preferred creditor should have any exceptional merit as such. It is not material whether he accepts an absolute conveyance in satisfaction of his debt or a mortgage to secure it. He may employ diligence, even haste, in securing the advantage,

which he has the legal right to accept, when other creditors are about to obtain priority by judgment. The measure of the danger occasioned by suits maturing to judgments is often the motive for seeking security, and, so far from affecting the act of obtaining the preference with illegality, justifies it. If there is no consideration, except to secure an existing debt, the mortgage, if free from actual fraud, will prevail over the judgment subsequently rendered. Bump Fraud. Conv. 178. The consideration becomes important only when the fraud is proved. *Basset v. Nosworthy*, 2 Eq. Lead. Cas. 1. To declare this mortgage fraudulent will start Bump on a new edition,—a thing to be avoided if possible.

*E. S. Drake*, for the appellee.

There is no force in the objection that the case was set down for hearing, without proof, by the complainant. The rule requiring two witnesses, or one witness and corroborating circumstances, is abrogated in this State by statute (Code 1871, § 1087), which makes the complainant's sworn bill of equal weight with the answer, and five months, the period allowed for taking proofs, had elapsed before the case was set down. The rule never applied to record evidence, which is the character of that in this case, and the denials in these answers are merely erroneous conclusions of law from admitted facts. The deed of trust is void, because fraudulent in fact, and fraudulent upon its face. The concurring badges of fraud are so numerous and grave that they are unanswerable. The pending suit (*Stanton v. Green*, 34 Miss. 576), the absence of the grantees (*Harney v. Pack*, 4 S. & M. 229; *Perkins v. Swank*, 48 Miss. 349), the kindred and confidential relations, the haste and unusual manner of executing and recording, the pretended agency and the inadequacy of price (Bump Fraud. Conv. 50, 54), are met by denials of fraud in the answers. The chancellor has determined the issue, and this court will not disturb his conclusion. But, further, the instrument as to existing creditors is *prima facie* void. It is not a deed in extinguishment of a pre-existing debt, or a mortgage executed upon a new consideration, but is a mere security for an existing debt, and until sustained by proof, it is fraudulent in law. As the deed of trust

was executed to secure a pre-existing debt, without a new consideration, the grantees are not purchasers for value. *Harney v. Pack*, 4 S. & M. 229; *Pope v. Pope*, 40 Miss. 516; *Perkins v. Swank*, 43 Miss. 349; *Hinds v. Pugh*, 48 Miss. 268; *Schumpert v. Dillard*, 55 Miss. 348. It is in effect a voluntary conveyance, subject to the infirmities incident to that class of instruments. *Catchings v. Manlove*, 39 Miss. 655. The beneficiary is a donee, and on him rests the burden of proving that the debtor had means outside of the property conveyed to meet his other liabilities. Bump Fraud. Conv. 286. Having failed to do this, the court will infer that it was designed to hinder creditors, and conclusively presume it to be fraudulent. Bump Fraud. Conv. 282, 283.

CHALMERS, J., delivered the opinion of the court.

The trust-deed which is attacked as fraudulent in this case was executed by the grantors to secure pre-existing debts due their kinsfolk and intimate friends, and at a time when a heavy suit was pending against themselves, which was just about to ripen into a judgment. These facts, it is insisted, make it necessarily fraudulent in law, even though no fraud in fact was intended, and though the sole intent of the grantors was to give a preference among creditors. The counsel for the appellee concedes that the law would be otherwise if there had been an absolute transfer of property in extinguishment of a pre-existing debt, or if, upon a new consideration, there had been a mortgage executed to secure a contemporaneously contracted indebtedness, but insists that pre-existing creditors who surrender nothing and make no new advance cannot, in receiving a new security, be regarded as purchasers for value.

The defect in this position is in misconceiving the nature and effect of the doctrine of innocent purchasers without notice, or rather in failing to note the very words necessary to be used in announcing it. He is a *bona fide purchaser* in the eyes of the law who has paid value without notice of defects in the title of the thing bought, or of fraud upon the part of the seller. Where one has bought under such circumstances, his purchase will ordinarily cut off all unknown equities, and relieve against all secret frauds. But if there be no

defects of title to be cured, and no fraud upon the part of the seller to be relieved from, there is no occasion for the buyer to invoke the doctrine, nor can he be compelled to resort to it until the fraud or the defects have been affirmatively established by him who attacks the transaction. Conceding all that is claimed here, the defendants did only what they had a perfect right to do. Pressed by one creditor, they elected to incumber their property in favor of others, whom they thought more meritorious, or for whom they felt more affection, and in so doing they exercised a right immemorial in the common law, and one which every man practically and daily exercises when he pays one debt, leaving others unpaid. The only way in which other creditors can successfully assail such a conveyance is by showing that the debts pretended to be secured are simulated, or that the security was never intended to be enforced, and was given only as a sham to ward off the attacks of others, or that some benefit has been received by the grantor, as by a stipulation for unusual indulgence, or in some other way.

It is insisted that this view militates against the doctrine announced in *Harney v. Pack*, 4 S. & M. 229, *Pope v. Pope*, 40 Miss. 516, *Perkins v. Swank*, 43 Miss. 349, and other cases, in which it was announced that the reception of security for a pre-existing debt did not constitute the recipient a purchaser for value. Those cases, properly understood, only declare, what we now reiterate, that if the party attacking such a conveyance can show that there was a defect in the title of the thing conveyed, or an outstanding prior and superior equity, or fraud upon the part of the grantor, the grantee or beneficiary cannot claim to be relieved from such defects or frauds by reason of his own ignorance or innocence. Herein consists the difference between him who has paid and him who has not paid a new present consideration. The first cuts off all unknown equities, and is relieved from the effects of all secret frauds upon the part of the grantor, by his own good faith and his payment of value; the second, having paid no value, is not protected by his ignorance of defects or innocence of frauds, if in fact such frauds or defects existed.

The bill in this case asserts that the debts pretended to be secured were fictitious, and that the conveyance given for their protection was never intended to be enforced; but these allegations are explicitly denied by the answer, and the complainant having set the case down for hearing, without proof, must be treated as having admitted the truth of the answers, so far as they were responsive to the bill. That the debts secured were professedly due to relatives and intimate friends, that the conveyance preceded by four days only the recovery of a large judgment by the complainant against the grantors, that haste was made to have it recorded in counties where the grantors owned property before abstracts of the judgments could be enrolled there, might well be considered as suspicious circumstances, and as affording the complainant a basis for attacking the transaction; and yet they are equally consistent with the perfectly legitimate purpose of securing an honest debt.

The sworn answers of the defendants not only deny all fraudulent intent, but they specify with minuteness the several debts to protect which the instrument was made, giving the dates, amount, and consideration of each. The cause having been set down upon bill and answers, these responses must be taken as true. They effectually overthrow the equity of the bill. That the case was not set down within five months after answer filed does not affect the result. The burden of making out the case rested upon the complainant. The averments of the answers, being strictly responsive to the allegations of the bill, must, in the absence of proof, be taken as true.

*Decree reversed and bill dismissed.*

57 490  
72 978

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J. G. ROACH ET AL. v. W. J. BRANNON.

1. GROUNDS FOR ATTACHMENT. *Debtor's undervaluation of his assets.*

No clause in the statute (Code 1871, § 1420), which specifies the grounds for attachment, makes an undervaluation of his property by a debtor who is seeking a compromise with his creditors a cause for its issuance.



2. *SAME. Concealment of assets and refusal to pay.*

The ground that he has property, which he conceals and unjustly refuses to apply to his debts, is not sustained by proof that he offered a creditor only twenty-five cents on the dollar when his assets equalled half his debts, and stated that if his offers were rejected his creditors would get nothing.

3. *SAME. Surviving partner. Changing the form of assets.*

A surviving partner's investment of part of the firm assets in a retail liquor license is no ground for attachment, if he owes no individual debts and intends to sell out the stock, consisting entirely of liquor, at retail, in order to realize more for the firm creditors.

4. *SAME. Charitable donations. Yellow-fever epidemic.*

He does not subject himself to attachment by allowing to the family of his deceased partner support out of the firm assets for a few weeks after an epidemic of yellow fever and while he is winding up the business.

5. *SAME. Burden of proof. Estoppel.*

The plaintiff in attachment must establish the truth of the facts averred in his affidavit, except where such averments are made in reliance on the defendant's language or conduct, so that he is estopped from showing the contrary. *Cocke v. Kuykendall*, 41 Miss. 65, explained.

6. *SAME. Estoppel by conduct. Constituents.*

To constitute such estoppel, the language or conduct must be such as to have warranted the averments of the affidavit, the affiant must have believed them to be true, and have been led to that belief by the acts or declarations of the debtor.

7. *SAME. Fraud in law and in fact.*

Fraud in fact or in law constitutes ground for attachment; and although its existence must be established by the plaintiff, the jury should sustain the writ if they believe from the facts, notwithstanding the defendant's denials, that the intent existed, or the necessary consequence of the act was to defraud creditors.

8. *ATTACHMENT AGAINST SURVIVING PARTNER. Grounds therefor.*

An attachment can be sued out by a firm creditor against the surviving partner and levied on the assets of the partnership, but such creditor must aver and prove one of the specific grounds for attachment enumerated in the statute.

9. *SAME. Distinction between individual and firm creditors.*

*Semble*, that circumstances may exist which will justify the issuance of an attachment by a firm creditor against the partnership assets in the hands of a surviving partner, although his individual creditors cannot sustain one on the same facts.

10. *SAME. Unfair preference among creditors.*

*Semble*, that the application by a surviving partner of firm assets to his

individual debts is a violation of the clause of the statute which forbids an unfair preference among creditors.

11. PARTNERSHIP. *Dissolution by death. Payment of creditors.*

The surviving partner is not bound to distribute the partnership assets ratably among the firm creditors, but may pay one in full to the exclusion of the others.

12. SAME. *Creditor's bill. Chancery jurisdiction.*

A general creditor of a firm, who has no lien, cannot maintain a bill in chancery against the surviving partner to subject the partnership assets. *Freeman v. Stewart*, 41 Miss. 138; *Schmidlapp v. Currie*, 55 Miss. 597, cited.

13. WRONGFUL ATTACHMENT. *Measure of damages. Compensatory only.*

Damages for the wrongful issuance of an attachment under the statute must be compensatory only.

14. SAME. *Elements to be taken into account.*

The elements of damages defined by Code 1871, § 1462, consisting of lawyers' fees, travelling expenses, hotel bills, loss of trade, and special injury to business, are exclusive of all others.

15. SAME. *Loss of trade. Surviving partner.*

If the writ is levied on the firm assets in the hands of a surviving partner, who is winding up the business, no loss of trade can be estimated.

16. SAME. *Injury to credit. Insolvency.*

There can be no injury to credit if both the survivor and the firm are hopelessly insolvent.

17. SAME. *Lawyers' fees. None for cross-action.*

Lawyers' fees can be allowed only for defending the attachment suit, exclusive of the cross-action for damages.

18. SAME. *Number of lawyers employed.*

Fees can be allowed for one firm of lawyers only, unless the jury are satisfied by the evidence that the necessities of the case required more.

ERROR to the Circuit Court of Marshall County.

Hon. J. W. C. WATSON, Judge, did not preside in this case, but Hon. A. M. CLAYTON acted as judge *pro hac vice*.

*Watson & Smith*, for the plaintiffs in error.

1. If either of the grounds of attachment set out in the affidavit were true, or the plaintiffs had reasonable cause so to believe, the verdict for the defendant on the plea in abatement is erroneous. The surviving partner was violating his duty by trading with the firm assets and not applying them to the partnership debts. Story Part. §§ 328, 329, 331, 343; *Mayson v. Beazley*, 27 Miss. 106; *Stewart v. Burkhalter*, 28 Miss. 396; *Bank of*

*Port Gibson v. Baugh*, 9 S. & M. 290; *Williams v. Gage*, 49 Miss. 777. He had applied for license to continue the business, and was supporting the family of the deceased partner out of the partnership stock. *Sykes v. Sykes*, 49 Miss. 190; *Gaines v. Coney*, 51 Miss. 323; *Robertshaw v. Hanway*, 52 Miss. 713; *Bank v. Carrollton Railroad*, 11 Wall. 624. He was thus converting the assets of the firm into cash, for the purpose of meeting liabilities accruing after the co-partner's death. These were his individual debts, and to apply the firm assets to pay his own debts is itself a fraud on the firm creditors and ground for attachment. He informed the plaintiffs that if they did not accept the propositions which he had made them, they would never get anything, which was sufficient to warrant the attachment. *Livermore v. Rhodes*, 27 How. Pr. 506; *Drake on Attachment*, § 95. A debtor has no right to coerce a creditor into a bad compromise. *Hyslop v. Clarke*, 14 Johns. 458; *Austin v. Bell*, 20 Johns. 442; *Wakeman v. Grover*, 4 Paige, 23. This debtor, when he knew the value of his stock, misrepresented it to the plaintiffs, in order to force them into a settlement at twenty-five cents on the dollar. He also paid off certain firm creditors to the exclusion of others, and generally misapplied the assets, and was guilty of fraud in fact. But if his conduct was such as to delay creditors, it was fraudulent in law, and the attachment was rightfully sued out, however honest his intentions were. Opposing counsel err in contending that it is necessary to prove intentional fraud.

2. The defendant was estopped to deny the truth of the affidavit, because it was based upon his statements, made shortly before the writ was sued out. If the plaintiffs had reasonable ground to believe, from the defendant's conduct and language, the facts averred in the affidavit, the attachment was rightly sued out. The issue to be tried by the jury is, whether the attachment was wrongfully sued out, and not whether the facts stated in the affidavit are true or false. It was held in *Cocke v. Kuykendall*, 41 Miss. 65, that although the jury may believe that the facts stated in the affidavit are actually untrue, yet if they further believe that the statements of the defendant himself afforded the plaintiffs reasonable ground to believe

the affidavit true, they must sustain the writ. The doctrine of that case has never been departed from, but is expressly affirmed in *Morgan v. Nunes*, 54 Miss. 308.

3. The objection that the attachment will not lie against a surviving partner is without foundation. *Barcroft v. Snodgrass*, 1 Cold. 430. The firm creditors are without remedy in equity (*Stewart v. Freeman*, 41 Miss. 138), and, unless they can sue the survivor at law, they have no means of collecting their debts. Suits at law, judgments and executions against surviving partners are, however, of daily occurrence. What, then, is the objection to an attachment? If the estate is insolvent, and the surviving partner desires distribution *pro rata*, he has his remedy in equity, of which, however, the creditors of the firm cannot avail. As the debtor was applying the assets fraudulently to his private purposes, and was endeavoring to force the firm creditors into an unjust compromise, in which he succeeded in some cases, the attachment was the appropriate remedy.

4. The damages were excessive, and wholly unwarranted by the testimony. The only proper item of damage sustained by the defendant by reason of the seizure was the difference between the actual value of his goods and what they brought at sheriff's sale. He could not recover for loss of trade, for he had no right to do business with the partnership assets. This was no case for exemplary damages. If a large number of lawyers are employed by the defendant to defeat the plaintiffs, they cannot all claim fees. Should that rule prevail, some fraudulent debtor will next employ the entire bar of the State at his creditors' expense. The damages must be compensatory only, and confined exclusively to the items enumerated in the statute. If debtors can grow rich at the expense of attaching creditors, this law will prove a snare to the innocent, and an encouragement to the guilty to persist in fraudulent practises. An insolvent debtor risks nothing, and has the chance, if he can escape detection, to extinguish the debt and recover a balance. The rule allowing exemplary damages is contrary to the statute, and an encouragement to fraud.

*J. H. Watson*, on the same side, made an oral argument.

*Orlando Davis*, for the defendant in error.

1. The verdict is right. It is sustained by the evidence, and will not be disturbed upon the ground of errors of law committed at the trial, or in the charges. This has been held, in all the various aspects in which the question was presented, in the following cases: *Hill v. Calvin*, 4 How. 231; *Pritchard v. Myers*, 11 S. & M. 169; *Wiggins v. McGimpsey*, 13 S. & M. 532; *Simpson v. Bowdon*, 23 Miss. 524; *Holloway v. Armstrong*, 30 Miss. 504; *Corbin v. Cannon*, 31 Miss. 570; *Hanna v. Renfro*, 32 Miss. 125; *Fore v. Williams*, 35 Miss. 533; *Cameron v. Watson*, 40 Miss. 191; *Hanks v. Neal*, 44 Miss. 212; *Memphis Railroad Co. v. Whitfield*, 44 Miss. 466; *Tush-ho-yo-tubby v. Barr*, 45 Miss. 189; *New Orleans Railroad Co. v. Field*, 46 Miss. 573; *Garrard v. State*, 50 Miss. 147; *Germania Ins. Co. v. Francis*, 52 Miss. 457; *O'Leary v. Burns*, 53 Miss. 171; *Graham v. Fitts*, 53 Miss. 307; *Duff v. Snider*, 54 Miss. 245; *Rothschild v. Hatch*, 54 Miss. 554. Neither of the grounds of attachment laid in the affidavit can be sustained without proof of intentional fraud amounting to moral turpitude. There is no evidence tending to sustain such a theory.

2. Surviving partners are trustees for all concerned in the partnership, for the representatives of the deceased, for the creditors, and for themselves. *Parsons Part.* 441, 442; *Case v. Abeel*, 1 Paige, 398. They may collect, compromise, or otherwise arrange all the debts of the firm. And their doings generally in this behalf are valid, if honest, and within the fair scope and purpose of the trust. And if there be negligence, delay, misconduct, or gross mistake, equity will interfere and give the proper relief. *Parsons Part.* 442. This, and not the writ of attachment, is the remedy provided by law for misconduct of surviving partners. To hold otherwise would be to establish a new ground of attachment besides those given in the statute. A surviving partner being a trustee, a court of equity, and not a court of law, is the proper forum in which to enforce remedies against him. 1 Story Eq. Jur. § 29; 2 Perry on Trusts, §§ 816-818; Bigelow on Fraud, 244; *May v. Le Claire*, 11 Wall. 217, 236. If to this it is replied, that here the defendant in error is personally liable for the debt, and therefore personally liable to attachment, such position is wholly untenable, because the suit is brought against the

defendant as surviving partner, and not in his private or individual capacity. This court has given the true construction of our attachment laws in the case of *Myers v. Farrell*, 47 Miss. 281, 284, where it says: "A leading purpose of the attachment laws, beginning with the amendment of 1844, is to secure to the creditor a remedy against the dishonest and fraudulent debtor." The grounds of attachment laid in this case, in their legal effect, charge dishonesty and fraud. The defendant being, as is shown, a trustee, the most that the evidence shows against him is, that he may, in some minor matters, have acted on a mistaken view of his rights, powers, and duties as such trustee.

3. The case of *Cocke v. Kuykendall*, 41 Miss. 65, is relied on by plaintiffs in their brief. The only principle decided in that case was, that the defendant was estopped by certain statements made by him to the plaintiff, upon which the plaintiff acted, and which afterwards proved to be false. So of the case of *Morgan v. Nunes*, 54 Miss. 308, affirming it. Both cases turned upon the estoppel, which does not arise in this case. No statement is shown to have been made by Brannon, moving the plaintiffs to act, which has turned out to be false. The plaintiffs in error rely upon the testimony of a witness, that Brannon told him that if the plaintiffs did not take certain amounts they would get nothing. This is denied by Brannon in his testimony, positively, who says he told the witness that if they would not take such as he had, they could get nothing. The jury have settled the conflict.

*Arthur Fant*, on the same side, argued the case orally.

CHALMERS, J., delivered the opinion of the court.

The plaintiffs in error, who were also plaintiffs in the court below, sued out this writ of attachment against the defendant, who was surviving partner of W. J. Marett & Co., in a retail liquor saloon in the town of Holly Springs. The affidavit for the writ was based upon the grounds that the defendant had property, or rights in action, which he was concealing, and refused to apply to the payment of his debts, and that he had assigned or disposed of, or was about to assign or dispose of, his property, or rights in action, or some part thereof, with

intent to defraud his creditors, or give an unfair preference to some of them, and that he had converted, or was about to convert, his property into money, or evidences of debt, with intent to place it beyond the reach of his creditors. The facts proved upon the trial, in support of the averments of the affidavit, were these: The defendant had written to the plaintiffs, asking for a composition of their demand, stating the impossibility of paying the debt due by his firm in full, and giving the value of the stock on hand as between twelve hundred and fourteen hundred dollars. The truth was that an invoice, taken by him the day before this letter was written, showed the prime cost of the stock on hand to be fourteen hundred and eighty-seven dollars. When called upon by the attorney of the plaintiffs to know how much he could or would pay, he refused to offer more than twenty-five cents on the dollar, though the firm assets would perhaps have paid fifty cents on the dollar; and he stated to the plaintiffs' attorney that, if he rejected this proposition, and also refused to receive certain claims, which he offered to transfer in liquidation of the plaintiffs' demand, his clients would never get a cent. This last statement is denied by him. He had applied to the corporate authorities of the town for a license to carry on in his own name the retail liquor business for a year, and confessed that he expected to pay for the privilege, the price of which was five hundred dollars, out of the receipts realized from daily sales of the firm's stock on hand. He had permitted the widow and family of his deceased partner to live in part, for a period of a month, out of the receipts of the firm's business accruing after the death of his partner. These are the facts which, it is claimed, authorized the issuance of the writ.

If we leave out of view the facts that the defendant was the surviving partner of an insolvent firm, that he was dealing with firm assets, and that the plaintiffs were firm creditors, and if we regard him as a private individual, negotiating with an individual creditor in relation to his own property, it is impossible to see that any of these facts come up to the allegations of the affidavit or the requirements of the statute. The letter written to the plaintiffs underestimated the value

of the goods on hand, if we accept the prime cost as the criterion of their value ; but we know that it frequently happens that a remnant of a stock of goods fails to bring first cost, and even if we treat the letter as an intentional underestimate, there is no clause in the statute which makes an undervaluation of his property by a debtor, who is seeking a compromise with his creditors, a ground of attachment. It is shown that the goods were freely exhibited, after this letter was written, and before the attachment, to a clerk of the plaintiffs, who examined them, and expressed the opinion that they would not sell for more than half the invoice price. That he only offered to pay twenty-five cents on the dollar, when the assets were probably worth fifty, and that he stated, if he did so state, that the plaintiffs' refusal to accept this, and their rejection of the proffered transfer of claims, would result in their getting nothing, does not come up to the allegation of the affidavit that he had property which he "concealed, and unjustly refused to apply to the payment of his debts." There must be both a concealment and a refusal to apply, and this implies an affirmative act of concealing, as well as a negative omission to pay. There was no secreting of anything, and we cannot predicate concealment of a mere failure to pay, though the debtor has ready money, and that money is not visible to the creditor. Money is never visible ordinarily, and so long as there is no attempt to secrete it, by clandestine removal or fictitious transfers or otherwise, and so long as it is kept and used as money ordinarily is, no ground of attachment is afforded. That he intended to re-embark in his own name in the business of a liquor dealer, and proposed to invest five hundred dollars in a license for that purpose, constituted no ground of attachment, though it was to be accomplished by a transmutation of property into money, and an investment of the latter in the license. A creditor cannot require his debtor to preserve the status of his estate, nor complain that he is about to change from one lawful pursuit to another. It might be that the investment of all his means in an invisible, intangible thing, like a liquor license, which has no practical pecuniary value, because neither transferable nor vendible under execution, would constitute ground of attachment, if



the purpose was simply to procure the license without availing of it. But where the purpose is to embark in an enterprise, all the materials and visible stock of which can be reached by the creditor, it amounts to nothing more than engaging in a new branch of business, and constitutes no ground of attachment. In this case, the debtor testified that his intention in procuring the license was to sell out the stock of liquors at retail, they being far more valuable in that way, and he being advised that he could not do this under the old license possessed by the firm. His object was to make the assets realize a larger fund for the firm creditors. Regarding him as dealing with his individual property, — and it is solely in this view that we are now considering the case, — it is quite evident that he did not subject himself to attachment by allowing the family of his deceased partner to be supported from the proceeds of the firm business. If the estate of the deceased partner was entitled to anything, his family was receiving only their just dues; and, if they were not, it amounted simply to a gratuity on the part of the defendant. However improper it may be for an insolvent person to give in charity that which he should appropriate to the payment of his debts, the fact that he does so has not been made in this State a ground of attachment.

But the defendant was not negotiating with an individual creditor, nor dealing with individual property. He was the surviving partner of an insolvent firm, and the plaintiffs were creditors of that firm. Two questions are presented by these facts: (1) Can an attachment be sued out against a surviving partner by a firm creditor? (2) If so, must such creditor bring himself within the letter of the attachment statutes and maintain his writ by showing a state of facts which would warrant an individual creditor in suing out the writ, or is it sufficient for him to show that the surviving partner has been faithless to the trust with which the law clothes him for the benefit of firm creditors, and has been guilty of conduct which the law regards as fraudulent, as to them, though admissible as to those to whom he is individually indebted?

We have no hesitation in answering the first question in the affirmative. We see no reason why an attachment may not be

sued out by a firm creditor against a surviving partner, and levied on the firm assets. The two objections urged against it—to wit, that it will destroy that equal distribution of the assets among the firm creditors, which the law requires, and that the appropriate remedy is in equity—rest upon false assumptions of law. A court of equity has no jurisdiction to entertain a suit brought by a firm creditor at large against a partnership, whether it be an existing one or one that has ceased by limitation or by the withdrawal or death of one of the partners. Firm creditors have no lien upon firm assets, nor any original right to require an application of them to their demands. The several partners have a right so to require, as among themselves, and it is solely because of this right that creditors are by subrogation accorded the same privilege when the courts come to wind up the business and distribute the funds. *Schmidlapp v. Currie*, 55 Miss. 597. But the creditor who has neither a lien nor a judgment has no *locus standi* in a court of chancery, nor any excuse for invoking its interference, and this is as true of the creditors of a partnership as of those of an individual. *Freeman v. Stewart*, 41 Miss. 138; *Case v. Beauregard*, 99 U. S. 119. Neither is it true that a surviving partner must distribute the assets of the firm ratably among the creditors; nor do the courts undertake to accomplish such a result, except where the distribution falls into their hands. The surviving partner may pay them in such amounts and in such order as he pleases, and may appropriate the whole assets to any one of them if he elects so to do. *Scott v. Tupper*, 8 S. & M. 280; *Bank of Port Gibson v. Baugh*, 9 S. & M. 290. He is the legal owner of the entire assets; and a firm creditor who has received nothing has no more right to complain that some other *bona fide* firm creditor has been paid in full, than the individual creditor of an ordinary person would have under the same circumstances. Any creditor is at liberty to bring suit at once against the surviving partner, and, by judgment and execution, seize and sell the entire assets. Why should he not be at equal liberty to accomplish the same result by attachment, since it is well settled that all property which is vendible under execution is subject to attachment?

Drake on Attachment, § 244. This consideration of itself demonstrates the fallacy of the proposition that attachment cannot be maintained against a surviving partner, for the reason that it breaks up an equal distribution of the assets. That the same result would be accomplished by a seizure under execution is undeniable, and that such seizure is admissible is undoubted. The fundamental error is in the assumption that the law undertakes to ensure an equal distribution, except where the administration is intrusted to the courts.

If, then, a firm creditor may sue out and levy an attachment upon firm assets in the hands of a surviving partner, upon what grounds must he proceed? Must he aver and prove one of the specific grounds of attachment laid down in the statute, or will it be sufficient to show that the surviving partner is acting in violation of that *quasi* trust imposed upon him by law for the benefit of firm creditors? We have no hesitation in saying that he must bring his case strictly within the letter of the statute. An attachment is with us an extraordinary remedy, and in some respects a harsh one. The circumstances which justify it are carefully and accurately defined by the lawgiver, and no exceptions or additions can be engrafted upon it by the courts. It may well be, however, that circumstances may exist which will warrant a particular creditor in resorting to the remedy when other creditors could not do so, as where the acts committed by the debtor were legally fraudulent as to him, though not so as to others. Thus one who had extended credit after the commission of the alleged fraudulent act would not be warranted in suing out an attachment on account of it, though pre-existing creditors might do so. So, too, cases may arise where the acts of a surviving partner would be fraudulent as to firm creditors, though not so as to his individual creditors, and the former would have a right to the writ of attachment, where the latter would not. An application of firm assets to his individual debts would probably be regarded as a violation of that clause of the statute which forbids an unfair preference among creditors, though as this record does not present that question, we express no decided opinion upon it; and the declaration that circumstances may exist which

would justify the issuance of an attachment by a firm creditor against a surviving partner, though the same right would not exist for his individual creditors, must also be accepted as lacking that authority to which it would be entitled if the facts of the case before us called for an application of the doctrine.

We are unable to see anything in the present case which warranted the attachment at the instance of either class of creditors. There are only two acts of the debtor which can admit of any doubt on this point, to wit, the temporary support of the family of the deceased partner from the proceeds of the firm business, and the proposed obtaining by himself of a license to carry on the business. The deceased partner died during the epidemic of yellow fever, by which the town of Holly Springs was ravaged in the summer and autumn of 1878. During its prevalence all business was suspended. The saloon of the firm was reopened after the cessation of the fever, on November 11. The attachment was sued out on December 20. During the few weeks that intervened, the family of the deceased partner was partly supported from the proceeds of the business. If the surviving partner's own family had been so supported, would it have afforded grounds of attachment? If, while both partners were alive, their families had been so supported, or if there had been two surviving partners after the death of a third, and the family of each had drawn from the firm business a temporary support in limited quantities, would this have afforded ground of attachment? We cannot think so. The clauses of our attachment laws under consideration are based upon the idea that the debtor has committed some act which is fraudulent in intent or fraudulent *per se* in law; that is to say, the party committing it must have an actual intent to defraud his creditors, or the necessary consequences of his act must be to defraud them. There was, we think, an absence of the actual intent here, and though the abstraction of any portion of the assets operated *pro tanto* to diminish the fund for the payment of creditors, we are not prepared to say that the support of a man's family out of his estate, whether he be a surviving partner or an ordinary individual, constitutes *per se* such fraud in law as subjects the party to attachment. Neither are we, under the circumstances

of this case, prepared to say that an attachment was authorized by the withdrawal of the amounts allowed to be abstracted by the widow of the deceased partner. Each case in this regard must be allowed to stand upon its own facts, and we decide only the case before us.

The defendant confessed that he expected to pay for the retail license, for which he had applied, out of the proceeds of the business, but stated that he made the application because the death of his partner operated by law as a revocation of the old license, and he could sell by retail only by obtaining a new one. Such sales as he did make were by the gallon, and he found that they yielded far less profit than sales by the drink. His object was to increase the value of the stock on hand, for the benefit of creditors. Whether such was his purpose was, by the instructions of the court, fairly submitted to the jury, and by their verdict they indorsed the truth of his statements. But it is said that the effect of such action on his part would have been to convert firm assets into individual property, and thereby necessarily to have operated as a fraud upon firm creditors. A transmutation of firm assets into individual property could only operate to the detriment of firm creditors, in the event that the party had individual creditors. In such case it might embarrass them by exposing the property to the claims of this latter class; but if there were none of these, the rights of the firm creditors could in no manner be affected. Partnership debts are equally binding upon the separate property of the partners, as upon the assets of the firm. The surviving partner in this case was the legal owner of the firm property, and a change of it by him, or an attempted change of it, into individual property, could in no manner affect its liability to the demands of firm creditors. They could only be hindered, delayed, or embarrassed in the event that there were individual creditors with whom they might be brought into collision. There is not only a failure to show that there were any such creditors in this case, but the record, by implication, strongly negatives the existence of any. The presence of any actual intent to defraud by this act being negatived, and there being a failure to show that its necessary result was to operate as a fraud upon firm creditors, this ground of attachment has not

been sustained. Our conclusion upon the whole case is, that the jury properly found that the attachment was wrongfully sued out.

It was insisted, both in the lower court and in this, that the attachment should be maintained if the jury were of opinion that the plaintiffs had reasonable ground to believe the truth of the facts set forth in the affidavit. The learned judge below rightly rejected this view. Neither the belief of the plaintiffs, nor the grounds of that belief, have ordinarily anything to do with the rightfulness of the issuance of a writ of attachment. By the affidavit, the plaintiffs assert the existence of certain facts. By his pleas in abatement, the defendant denies their existence. The sole issue for the jury to decide is, Did those facts exist? If so, the writ was rightfully sued out; if not, its issuance was wrongful. There may be cases in which the defendant will not be allowed to controvert the facts charged in the affidavit, by reason of his own previous conduct and declarations, but this does not affect the general principle, that the issue to be tried is the truth of the averment contained in the affidavit. It is simply the application of the familiar doctrine of estoppel, by which the defendant is precluded from showing the truth, because, by his previous assertion of a falsehood, he has induced the plaintiff to institute a suit which will result in serious injury to him if decided to be unfounded. Thus, if a debtor has placed on record a voluntary conveyance of his property, or avowed his intention to do so, and a creditor, believing the conveyance to be genuine, or the assertion to be sincere, has acted, in suing out an attachment in good faith, upon the belief thereby engendered, the debtor will not be allowed to say that the conveyance was a jest, or the assertion a piece of pleasantry. This is the doctrine illustrated in *Cocke v. Kuykendall*, 41 Miss. 65. The language used in that case is incorrect when it is said that "the issue to be tried and determined by the jury is whether the said attachment was wrongfully sued out, and not whether the facts stated in the affidavit were actually true or false." A more exact method of conveying the correct idea would be to say, that the plaintiff must establish the truth of the facts averred in the affidavit, unless the conduct of the defendant has been such as to pre-

clude him from showing their falsity. It should be borne in mind that this estoppel will not arise because of erroneous and unfounded inferences, which the plaintiffs may have drawn from the defendant's conduct, nor unless they have really acted upon the faith of that conduct, and upon the belief engendered and honestly entertained therefrom. The language or conduct must have been such as warranted the charges contained in the affidavit, the affiant must have believed them to be true, and that belief must have been caused by the acts or declarations of the debtor. Under such circumstances only will the defendant be precluded from showing the truth of the matter, and the plaintiff be relieved from establishing the existence of the facts charged by him. It will, of course, be understood that in all cases where a fraudulent intent is alleged, the jury must judge of that intent from the facts and circumstances of the case, and, notwithstanding the denials of the defendant, should find for the plaintiff if they believe that the intent existed in fact, or if the necessary consequence of the act was to defraud creditors. Fraud in law or fraud in fact alike constitutes ground of attachment, but the existence of either must be established by him who asserts it.

Although the jury properly found that the attachment was wrongfully sued out, the verdict must be reversed on account of the excessive damages allowed. The account sued on was for four hundred and thirty-four dollars. The damages allowed the defendant were six hundred and forty dollars. The allowance of damages for the wrongful issuance of an attachment, under our statute, must be compensatory only. It must not be converted into a means of paying off valid debts by recoupment or of growing rich by an excess of damages over the debt due, save in cases where great injury has in fact been sustained. The elements which the jury are allowed to take into the account are carefully defined by the statute, and are exclusive of all others. They consist of lawyers' fees, hotel bills, travelling expenses, loss of trade, and special injury to business. Code 1871, § 1462. Only two of these elements are shown to have existed here, to wit, lawyers' fees, and special injury to business. There were no hotel bills or travelling expenses.

There could be no loss of trade estimated, because the defendant was merely winding up the firm business, by selling out the stock on hand; and when he has received the full value of that stock, he will have obtained all that he is entitled to on that account. There could be no injury to credit, because it is shown that both he and his firm were hopelessly insolvent. No allowance for lawyers' fees can be made except for defending the suit brought by the plaintiffs. No account can be taken of the cross action for damages. *Furstenheim v. Coffee, MS.* Fees can be allowed for one firm of lawyers only, unless the jury shall be satisfied by the evidence that the necessities of the case required more than one. Defendants cannot swell the damages to be paid by plaintiffs by the unnecessary employment of a multitude of counsel. The full measure of damages to which the defendant was entitled in this case, under the proof, was the fee of one firm for defending an attachment suit for four hundred and thirty-four dollars, and the difference in price between what the goods seized sold for under the sheriff's hammer, and what they would have sold for in due course of trade, the liquors to be estimated as being sold by the gallon.

*Judgment reversed and judgment here on remittitur.*

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ORLANDO DAVIS v. MATTIE J. LUMPKIN ET AL.

1. DEED. *Verbal gift of land. Relation back.*

A verbal gift of land by a father to his daughter soon after her marriage is void, although she takes possession at the time, and his subsequent conveyance, made after he becomes insolvent, will not, as against his creditors, relate back to the time of the gift.

2. SAME. *Delivery. Retention by grantor. Intention.*

A paper, in the form of a deed of gift, executed at the time of the donation, is ineffectual for want of delivery, although signed and sealed by the donor and his wife, if retained by him, and treated by all the parties as a memorandum from which a deed was afterwards to be drawn.

3. FRAUDULENT CONVEYANCE. *Prior creditors. Judgment lien.*

If the father, after he becomes insolvent, makes a voluntary convey-



ance to his daughter, it is void as against existing creditors, and the land conveyed is subject to their judgments subsequently obtained against the grantor.

4. JUDGMENT LIEN. *Bankruptcy of debtor. Execution.*

Neither the bankruptcy and discharge of the judgment debtor, nor the appointment of an assignee and the assignment to him, affect the lien on the land of the judgment in the State court, or hinder its enforcement by execution.

5. SAME. *Jurisdiction of Federal and State courts. Assignee's rights.*

The assignee has the right to take the matter into the Bankruptcy Court, but if the judgment calls for more than the land is worth, and he declines to assert his right, the State courts may proceed to enforce the lien, without invading the jurisdiction of the Federal courts, or contravening the bankrupt law.

6. CREDITOR'S BILL. *Federal and State courts. Limitation against assignee.*

If the assignee in bankruptcy, when summoned, fails to appear in the State court, where the judgment creditor's bill is pending, or to take any other step for two years after the assignment to him, he is barred by the limitation of the Bankrupt Act, but the judgment creditor is not, and the State court will subject the land.

7. SAME. *Jurisdiction. Statute passed pending suit.*

Sect. 711 of the Revised Statutes of the United States, which provides that the jurisdiction of the Federal courts shall be exclusive of the courts of the several States as to all matters and proceedings in bankruptcy, does not affect the creditor's bill filed in the State court before the Revised Statutes were adopted. U. S. Rev. Stats. § 5597.

8. SAME. *Chancery practice. Marshalling assets.*

While a prior grantee can compel the judgment creditor to first sell land, subsequently conveyed by the debtor, and equally subject to the lien, he cannot do so if the latter land has been levied on under prior judgments, and is so involved in litigation that it presents no source even of partial satisfaction.

9. CHANCERY PRACTICE. *Pleading. Answer. Denial of statement in bill.*

If the answer to a bill which charges that judgments are paid, refers to the respondent's denial in another case in the same court, that, in the absence of exception, is not, by virtue of Code 1871, § 1024, to be taken at the hearing as an admission of payment.

APPEAL from the Chancery Court of Tippah County.

Hon. A. B. FLY, Chancellor.

Harrison P. Maxwell, who was in March, 1859, the owner of much valuable land, including the tract in controversy, and considered wealthy, was unable to pay a large judgment against him, and borrowed the money from Orlando Davis,

to whom he gave his promissory note, which was renewed from time to time, adding the accrued interest. Davis sued on the last note, given on Oct. 4, 1861, and recovered a judgment against Maxwell, on Sept. 8, 1866, for over four thousand dollars. Mattie J. Maxwell, the daughter of Harrison P. Maxwell, was married to Olin H. Lumpkin, and soon afterwards, in June, 1862, her father, by way of advancement, informed her that he gave her the land in controversy. She and her husband erected some cabins thereon, and located slaves there. At the same time, her father told her that he had made a memorandum of the gift, and would on the first opportunity have it drawn up in proper form. The memorandum, which was in the form of a deed of gift, signed and sealed by her father and mother, was locked up by the father in his desk, where it remained until August, 1870, when he delivered it to one of the solicitors for use in this suit.

At the close of the civil war, Mr. Maxwell was insolvent, and was pressed by his creditors. On April 17, 1866, he executed to his daughter a deed of gift of the land in controversy, which was properly acknowledged, recorded and delivered. Seven days afterwards, he conveyed his entire estate, real and personal, to John A. Moorman, as trustee for his wife; stating as the consideration that he owed her over twenty thousand dollars for money, slaves, choses in action and other personal property, which she received after her marriage. Executions, under four other judgments, which Davis held against him, were then levied upon the land conveyed to his wife. On Dec. 7, 1868, Maxwell was, upon his own petition, adjudicated a bankrupt, and on Oct. 21, 1869, the register assigned his estate to Lafayette Rogan, who had been appointed assignee on the previous day. When Maxwell applied for his discharge, the creditors who had proved their claims, opposed it on the ground of the two conveyances, but the Bankruptcy Court held that, as they were made before the passage of the bankrupt act, they constituted no ground of objection, and on June 14, 1870, granted the discharge, but directed the assignee to file a bill in that court against the grantees in the deeds, to test their validity. The assignee took no further steps, and has not reported

or been discharged. An execution, under the judgment of Sept. 8, 1866, was, on May 15, 1869, levied upon the land which Maxwell had conveyed to his daughter.

Two bills in chancery were filed against Orlando Davis on July 5, 1869, — one by Mrs. Maxwell, to enjoin the sale of the lands conveyed to her, under the executions levied thereon, upon the allegation, among others, that the judgments had been paid; and the other, the original bill in the case at bar, by Mr. and Mrs. Lumpkin, to enjoin the sale of the land in controversy, under the judgment for four thousand dollars, and also to enjoin the four other judgments on the same allegations as those in the former bill. These bills were not sworn to, but as the acts of February, 1867 (Acts 1867, pp. 225, 425), were in force, the injunctions were granted by the Probate Judge as therein authorized. The latter bill alleged a verbal gift of the land in 1862, followed by the deed of 1866. In his answer and cross-bill thereto, Davis pleaded the Statute of Frauds, and, as to the allegation that the four other judgments were paid, referred to his answer to the former bill, in the case of *Maxwell v. Davis* pending in the same court, which specifically denied the payments; and on the ground of Maxwell's insolvency, when he made the deed of gift, which was alleged to be part of a general scheme to defraud his creditors, the cross-bill prayed that such deed be declared void as against the lien of Davis's judgment. Mrs. Lumpkin, in her answer to this cross-bill, filed Aug. 29, 1870, set up her father's bankruptcy in bar of the relief asked, and also produced and filed as an exhibit the "memorandum," under which she alleged that she had held title since its date, June 12, 1862, at which time her father was solvent. Her husband's answer was the same. On Aug. 11, 1875, Mrs. Lumpkin and her husband filed an amended bill, alleging that the memorandum was a deed duly delivered to her, and held for her by her father; that owing to the confusion of the civil war it was not recorded, and was supposed by every one to be lost; that, under that idea, the second deed was executed, which, by relation back made the first deed valid; and that, after the original bill was filed, the first deed was found. The amended bill also set up the large amount of other prop-

erty owned by Maxwell, and claimed that, as her deed was prior in date to her mother's, Davis should exhaust the land conveyed to her mother before hers; and, exhibiting the entire record of the bankruptcy proceedings, it made Rogan, the assignee, a party defendant; and pleading the Statute of Limitations of two years against him, and alleging that the statute barred Davis also, prayed for a perpetual injunction against both. The assignee was summoned, but failed to appear, and a *pro confesso* was entered against him. Davis filed an answer and cross-bill, in which he denied the delivery of the memorandum, and the father's holding it as agent; denied that the second deed related back, and that the bankruptcy proceedings affected his lien or cut off his right to levy execution. He alleged that all the land was insufficient to pay his five judgments; that four had been levied on that conveyed to the mother, who was now contesting the matter with him and other creditors in another suit; set up his five liens against Maxwell, his donee and his assignee in bankruptcy; and averred that the injunction, by preventing him from proceeding, stopped the running of the Statute of Limitations. The answer and cross-bill admitted the assignee's right to draw the matter into the Bankruptcy Court, but averred that, as the land was insufficient to pay Davis's judgment liens, Rogan abandoned that course, and was precluded from now adopting it; but, making him a party, asked that the deed and memorandum be declared void, and the judgment liens enforced. An answer to this cross-bill was filed by Mr. and Mrs Lumpkin, and *pro confesso* was taken against the assignee, after due service of process. From a final decree on all the evidence, perpetuating the injunction and dismissing Davis's cross-bills, he appealed.

*E. S. Hammond* and *Orlando Davis*, for the appellant.

I. A judgment creditor may proceed in the State courts, after the bankruptcy of the judgment debtor, to enforce the lien of his judgment against the property of the bankrupt, fraudulently conveyed by deed of gift, by levying his execution and filing a bill in equity, in aid thereof, against the fraudulent donees, to set aside the conveyance.

1. Bills of the character of the cross-bills of Davis in this case afford ancillary aid, to give efficacy to the legal remedy, and may be filed either before or after the execution sale. *Vasser v. Henderson*, 40 Miss. 519; *Allen v. Montgomery*, 48 Miss. 101; *Partee v. Mathews*, 53 Miss. 140; *Fleming v. Grafton*, 54 Miss. 79; *Jones v. Green*, 1 Wall. 830. This remedy should not be confounded with the ordinary creditor's bill based on a judgment and return of *nulla bona*, like the cases of *Farned v. Harris*, 11 S. & M. 366, and *Brown v. Bank of Mississippi*, 31 Miss. 454. The appellant stands simply upon his liens, all older than Maxwell's bankruptcy, and seeks the aid of equity to make his legal remedy effective; and his bill is supported, as to jurisdiction, by being grafted upon the original suit at law, as auxiliary thereto and part thereof. *Hatch v. Dorr*, 4 McLean, 112. The principle will be found illustrated and enforced in many cases in the Supreme Court of the United States. *Dunlap v. Stetson*, 4 Mason, 849; *Dunn v. Clarke*, 8 Peters, 1; *Gwin v. Breedlove*, 2 How. 29; *Freeman v. Howe*, 24 How. 450; *Railroad Co. v. Chamberlain*, 6 Wall. 748; *Bank v. Turnbull*, 16 Wall. 190.

2. The proposition of the appellees, that, by virtue of the adjudication, the Bankruptcy Court acquired exclusive jurisdiction of all controversies relating to the bankrupt's property, has been settled against them by this court. *Russell v. Cheatham*, 8 S. & M. 703; *Talbert v. Melton*, 9 S. & M. 9; *Bush v. Cooper*, 26 Miss. 599; *Bruner v. Sherley*, 27 Miss. 407; *Allen v. Montgomery*, *ubi supra*; *Reed v. Bullington*, 49 Miss. 228; *Winters v. Claitor*, 54 Miss. 841. The same principle has been decided by the Supreme Court of the United States. *Eyster v. Gaff*, 91 U. S. 521; *Burbank v. Bigelow*, 92 U. S. 179; *Clafin v. Houseman*, 93 U. S. 130; *McHenry v. La Société Française*, 95 U. S. 58; *Yeatman v. Savings Institution*, 95 U. S. 764. And it has been so held in the State courts. *McCance v. Taylor*, 10 Gratt. 580; *Tichenor v. Allen*, 13 Gratt. 15; *Spilman v. Johnson*, 27 Gratt. 33; *Doremus v. Walker*, 8 Ala. 194; *Freeny v. Ware*, 9 Ala. 370; *Rugely v. Robinson*, 19 Ala. 404; *Crowe v. Reid*, 57 Ala. 281; *Sheffey v. Davis*, 60 Ala. 548; *Sorden v. Gatewood*, 1 Ind. 107.

8. It is urged, however, that the title of the assignee in bankruptcy is absolute in such a sense that no litigation can proceed in any court in relation to the property of a bankrupt, except in the assignee's name, and especially where the property has been conveyed by the bankrupt in fraud of creditors. The distinction between property conveyed by the bankrupt in fraud of his creditors, and his other property, is based on the clause of the bankrupt law of 1867, not in that of 1841, the third section whereof vested in the assignee all the bankrupt's property, but was silent as to that fraudulently conveyed. 5 Stats. at Large, 442, 443. Under that act, our courts held that the assignee could not maintain a bill to vacate such a conveyance made before the law was passed. *Porter v. Duglass*, 27 Miss. 379; *Abbey v. Commercial Bank*, 84 Miss. 571. Doubtless to meet that difficulty, the Bankrupt Act of 1867, § 14, after enumerating the other property which vests in the assignee, adds, "and all the property conveyed by the bankrupt in fraud of his creditors." The assignee's title to such property is, under the act of 1867, the same as his title to the rest of the bankrupt's estate. That title is not to the whole estate, such as heirs and executors take, but only to the estate in which the bankrupt has the beneficial, as well as the legal interest. *James on Bank*, 86; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596. The assignee takes the property and rights of property of the bankrupt, subject to all such rights and equities of third persons as attached to them in the hands of the bankrupt. *Ex parte Newhall*, 2 Story, 360; *Moore v. Jones*, 23 Vt. 739; *Clason v. Morris*, 10 Johns. 524; *Kip v. Bank of New York*, 10 Johns. 63; *Mitchell v. Winslow*, 2 Story, 630; *Winsor v. McLellan*, 2 Story, 492; *Palmer v. Thayer*, 28 Conn. 237. The title of the bankrupt passes to his assignee, subject to his creditors' liens. *Doe v. Childress*, 21 Wall. 642; *Bates v. Tappan*, 99 Mass. 376; *Bowman v. Harding*, 56 Maine, 559; *Sampson v. Burton*, 4 B. R. 1; *Leighton v. Kelsey*, 57 Maine, 85; *Perry v. Somerby*, 57 Maine, 552; *Stoddard v. Locke*, 43 Vt. 574; *Daggett v. Cook*, 37 Conn. 341. The assignee is not a *bona fide* purchaser for a valuable consideration. The title comes into his hands in no more perfect condition than it left the bankrupt's; he is a volunteer

rather than a purchaser. *Talcott v. Dudley*, 4 Scammon, 427. His title will not divest a legal or equitable lien, or an attachment lien. *Deacon on Bank*. (Eng.), 429, 646; *Bump on Bank*. 316, 326, 514, 603, 609, 628, 700, 706.

4. Not only are the creditor's liens preserved, but likewise his remedies. He may disregard the bankruptcy in pursuing them, so long as he does not seek a personal judgment against the bankrupt. Whenever the rights of the assignee are involved, he alone must protect them. He does this, like other suitors, by appropriate action in courts of competent jurisdiction, except that he has the Bankruptcy Court added to the list of courts in which he may sue or be sued. He could have sued in any court of competent jurisdiction, State or Federal, to set aside this fraudulent conveyance. *Johnson v. Bishop*, 1 Woolw. 324, 329. But wherefore should he sue? The liens would exhaust the land, and, being interested only in the surplus, he did no more than his duty in not suing, even if he were directed by the Bankruptcy Court to sue. *McHenry v. La Société Française*, 95 U. S. 58; *Bump on Bank*. 506, 621. By failing to sue for two years, the assignee is barred, as are all creditors claiming by, through, or under him. But the appellant, who claims adversely to the assignee, is not barred by virtue of the Bankrupt Act. His right comes from an enrolled judgment, which is a lien by virtue of the statute of Mississippi. He cannot prove his debt without waiving his lien. U. S. Rev. Stats. § 5075. The assignee cannot defeat the lien by action or non-action. At most, he can draw the matter into the Bankruptcy Court, sell the property, pay the lien creditor, and retain the surplus for general creditors. *Bump on Bank*. 601. The assignee and general creditors having thus relinquished by non-action to a secured creditor the assignee's interest in the property, the jurisdiction of the State courts to perfect or enforce the title thus acquired cannot be questioned. *Second National Bank v. National State Bank*, 10 Bush, 367; *Bump on Bank*. 621. This abandonment has likewise inured to the benefit of the fraudulent donees. Such is the effect of all Statutes of Limitations. The controversy between Davis and the donees in

this case is thus left free of all question touching the bankruptcy.

5. It is further insisted that the execution was the beginning of a new proceeding, which could not take place after bankruptcy. But, without surrendering the position that all subsequent proceedings were ancillary to the lien, the appellant insists that the execution and bill were proper after bankruptcy. In *Sorden v. Gatewood*, 1 Ind. 107, the right of a lien creditor to take out and levy execution after bankruptcy was sustained. The bankruptcy of a defendant in execution does not destroy the judgment lien or prevent the issue of an *alias* execution for its enforcement. *Sheffey v. Davis*, 60 Ala. 548. In Pennsylvania, a judgment creditor, having a lien older than the bankruptcy, was allowed to take out and levy execution after bankruptcy, and to proceed on his lien, although the assignee was a party and resisting. *Reeser v. Johnson*, 76 Penn. St. 313. The rule appears to be universal. *McCance v. Taylor*, 10 Gratt. 580; *Tichenor v. Allen*, 13 Gratt. 15; *Freney v. Ware*, 9 Ala. 370; *Rugely v. Robinson*, 19 Ala. 404; *Crowe v. Reid*, 57 Ala. 281. In this State the decisions are to the same effect. *Russel v. Cheatham*, 8 S. & M. 708; *Talbert v. Melton*, 9 S. & M. 9; *Reed v. Bullington*, 49 Miss. 223. Executions have been issued in the enforcement of liens after bankruptcy, and sustained by this court. In *Bush v. Cooper*, 26 Miss. 599, a bill filed after bankruptcy to enforce the lien of a mortgage was sustained. In the cases of *Bruner v. Sherley*, 27 Miss. 407, *Allen v. Montgomery*, 48 Miss. 101, and *Winters v. Claitor*, 54 Miss. 341, the creditors failed only for want of a lien, while the court in each case fully recognized the rights of lien creditors. The Supreme Court of the United States has sustained the right of the lien creditor to issue and levy his execution after bankruptcy commenced. *Savage v. Best*, 3 How. 111; *Scott v. Kelly*, 22 Wall. 57. So of the right of a judgment creditor to file a bill after bankruptcy to enforce his lien, or to file a bill after bankruptcy to enforce a mortgage. *Burbank v. Bigelow*, 92 U. S. 179; *McHenry v. La Société Française*, 95 U. S. 58. The same is true where no execution has ever issued, no levy been made, and



the judgment creditor stands upon his lien alone. *Mays v. Fritton*, 20 Wall. 414.

6. Analyzing the cases before cited from the Supreme Court of the United States, and also the following cases, counsel contended on a close inspection of them it would be seen, that where the lien exists before bankruptcy, any court, State or Federal, has jurisdiction to enforce it, without regard to the time, place or manner of the commencement of the proceedings, and without regard to the time of issuing executions, or making levies and sales. *Ex parte Christy*, 3 How. 292; *Norton v. Boyd*, 3 How. 426; *Peck v. Jenness*, 7 How. 612; *Colby v. Ledden*, 7 How. 626; *Marshall v. Knox*, 16 Wall. 551; *Wilson v. City Bank*, 17 Wall. 473; *Longstreth v. Pennock*, 20 Wall. 575; *Clark v. Iselin*, 21 Wall. 360; *Ray v. Norseworthy*, 23 Wall. 128; *Eyster v. Gaff*, 91 U. S. 521.

7. It is contended, that by the Revised Statutes of United States, § 711, the jurisdiction of the Bankruptcy Court is made exclusive over this controversy. But the Revised Statutes were passed Dec. 1, 1873, and by § 5597 thereof, all accrued rights and pending suits are saved from its operation: it does not oust the State court of a suit pending therein before its passage. *Goodrich v. Wilson*, 119 Mass. 429; *Clafin v. Houseman*, 93 U. S. 180; *Kidder v. Horrobin*, 72 N. Y. 159. But this is not a matter or proceeding in bankruptcy. Neither party claims through the bankruptcy proceedings, but both parties claim adversely to the assignee, who asserts no claim against either, and has abandoned all claim against both. *Hanson v. Herrick*, 100 Mass. 323; *Stickney v. Wilt*, 23 Wall. 150. In fact, § 711 makes no change in the law. The United States courts always had exclusive jurisdiction in bankruptcy proceedings proper, which never were or could be carried on in the State courts. *Winters v. Claitor*, 54 Miss. 341. Notwithstanding § 711, an action may be brought in a State court by an assignee to collect assets of the bankrupt, and to foreclose a mortgage. *Wente v. Young*, 17 B. R. 90; *Burlingame v. Parce*, 17 B. R. 246. Suits by the assignee against any person claiming adverse interest, are no part of the bankruptcy proceeding. They are only in aid of such a proceeding. *Wisswall v. Campbell*, 98 U. S. 347.

8. The two years' Statute of Limitations is set up against the assignee by the appellees, who contend that because it bars him it bars the appellant also. The statute (Bankrupt Act, 1867, § 2) is a copy of the eighth section of the act of 1841. The precise question presented here has been decided adversely to the position of the appellees. *Tichenor v. Allen*, 13 Gratt. 15; *Dewey v. Moyer*, 72 N. Y. 70. But the plea is a personal plea of the assignee. The appellant and the appellees stand upon equal equities, and the controversy between them is not affected by the fact that the assignee is barred. *Rawls v. American Ins. Co.*, 27 N. Y. 282; *Hyde v. Van Valkenburg*, 1 Daly (N. Y.), 416; *Tichenor v. Allen*, *ubi supra*. The same is true of bankruptcy, infancy, and usury, and all this class of defences. *Dewey v. Moyer*, *ubi supra*; *Bowman v. Pope*, 33 Miss. 94; *Alsworth v. Cordtz*, 31 Miss. 32. In *Abbey v. Commercial Bank*, 31 Miss. 434, this court refused to allow a fraudulent grantee to set up the Statute of Limitations, as between his grantor and a creditor who was seeking to set aside the fraudulent conveyance.

II. The memorandum of June 12, 1862, was never delivered. Neither a deed nor memorandum is a sufficient compliance with the Statute of Frauds, so long as it remains in the exclusive possession of the grantor. It was obviously not the intention of these parties that the grantor should hold this deed as agent: it was retained as a memorandum from which a deed was to be subsequently drawn. The law upon the subject of the delivery of deeds and writings has been fully laid down by this court adversely to the position of the appellees in this case. As against creditors of the grantor, a constructive delivery must be clearly proved. *Bledsoe v. Little*, 4 How. 13; *Kane v. Mackin*, 9 S. & M. 387; *Wall v. Wall*, 30 Miss. 91; *M'Gehee v. White*, 31 Miss. 41; *Bullitt v. Taylor*, 34 Miss. 708; *Morris v. Henderson*, 37 Miss. 492; *Jiggitts v. Jiggitts*, 40 Miss. 718; *Kearny v. Jeffries*, 48 Miss. 343; *Jelks v. Barrett*, 52 Miss. 315; *Cocks v. Simmons*, *ante*, 183. The same rules prevail in other States. *Parker v. Parker*, 1 Gray, 409; *Hatch v. Haskins*, 17 Maine, 391; *Maynard v. Maynard*, 10 Mass. 456; *Hawkes v. Pike*, 105 Mass. 560; *Cook v. Brown*, 34 N. H. 460; *Fisher v. Hall*,

41 N. Y. 416; *Folly v. Vantuyl*, 4 Halst. 153; *Crawford v. Bertholf*, 1 Saxt. 458.

III. Both the deed of April 17, 1866, and the memorandum of 1862, even admitting the latter to be valid, are on their faces voluntary conveyances. Until a recent period, such conveyances were held to be void as to existing creditors. *Young v. White*, 25 Miss. 146; *Bogard v. Gardley*, 4 S. & M. 302; *Catchings v. Manlove*, 39 Miss. 655. In *Wilson v. Kohlheim*, 46 Miss. 346, this court laid down the new rule, that a man might give to his child a reasonable part of his property if he was not largely in debt at the time; but it was held that, if he was insolvent, the gift could not stand whether made with fraudulent intent or not. It has since been held that the law presumes a voluntary conveyance to be void, and the donee must establish the facts which repel the presumption. *Pennington v. Seal*, 49 Miss. 518; *Cock v. Oakley*, 50 Miss. 628. This is in accordance with settled authority. *Richardson v. Rhodus*, 14 Rich. 95; *Van Cleef v. Fleet*, 15 Johns. 147; *Van Wyck v. Seward*, 18 Wend. 375; *Davis v. Herrick*, 37 Maine, 397; *Smith v. Reavis*, 7 Ired. 341; Bump Fraud. Conv. 286, 294. These principles, applied to the facts, render the two deeds void.

IV. The appellees claim in their amended bill that the deed of April 17, 1866, validates by relation the memorandum of June 12, 1862. The doctrine of relation is not favored by the courts. Chancellor Kent speaks of it as a dormant power of mysterious energy, too mischievous to be endured. 4 Kent Com. 339. It may be used to advance justice, but never when it would deprive a party of a legal right. Burr. Law Dic., tit. Relation; *Pearson v. Darrington*, 21 Ala. 169. It is never to be adopted when third parties, who are not privies or parties thereto, will be prejudiced thereby. *Montgomery v. Ives*, 13 S. & M. 161; *Heath v. Ross*, 12 Johns. 140. As the deed of 1866 was void, it cannot validate any thing.

V. The defence that Maxwell's other lands are first liable is set up by the appellees in their amended bill. The answer of the appellant to the allegation is, that all Maxwell's other lands are levied on by other executions, and for that reason, and also because all the lands together are not enough to pay his

judgments, no case for marshalling assets is presented. It cannot be done without prejudice to the appellant, who is restrained by Mrs. Maxwell. *Drake v. Collins*, 5 How. 253; *Pallen v. Agricultural Bank*, 1 Freem. Ch. 419; s. c. 8 S. & M. 357; *Keaton v. Miller*, 38 Miss. 630; *Briggs v. Planters' Bank*, 1 Freem. Ch. 574; *Rollins v. Thompson*, 13 S. & M. 522; *Cheesebrough v. Millard*, 1 Johns. Ch. 409. Mrs. Maxwell is a necessary party to such a proceeding. Story Eq. Pl. § 162. Her rights would be directly affected. As she was not made a party by the appellees in their bill, she could not be by the appellant in his cross-bill.

VI. The defence that four of the judgments are paid is based on Code 1857, p. 547, art. 44; Code 1871, § 1024. In the original bill which was filed under statutes (Acts 1867, pp. 225, 425), and not sworn to, it is averred that these judgments are paid, and it is stated in argument that this averment is not denied, but the answer refers to another answer to a bill on file in the same court, where similar averments are made. This manner of answering was proper pleading, and allowable under the rules of the Chancery Courts in this State. Chancery Rules, 13, 14; 1 Freem. Ch. 18. If, under these rules, the answer was not satisfactory, the complainants should have excepted. 1 Dan. Ch. Prac. 768. Having treated the answer as sufficient, they are now estopped. It is too late to make such a point after final decree.

VII. On the prayer of the appellant's cross-bill, all five of his judgment liens should have been enforced. The original bill prays for an injunction against the five judgments. Courts of equity have general jurisdiction to enforce liens. 1 Story Eq. Jur. § 506; 2 Story Eq. Jur. § 1216 b; *Richardson v. Warwick*, 7 How. 131; *Jenkins v. Bodley*, S. & M. Ch. 338. They will intervene in aid of the legal right, without issue and return of execution. *Hilzheim v. Drame*, 10 S. & M. 556; *Berryman v. Sullivan*, 13 S. & M. 65; *Fowler v. McCartney*, 27 Miss. 509; *Snodgrass v. Andrews*, 30 Miss. 472; *Vasser v. Henderson*, 40 Miss. 519, 520; *Fleming v. Grafton*, 54 Miss. 79.

*Orlando Davis*, on the same side, made an oral argument.

*E. M. Watson*, for the appellees, argued the case orally and filed a brief.

I. The right of Mrs. Lumpkin to have this judgment enjoined as to her land, until that subsequently conveyed to Mrs. Maxwell is exhausted, is clear. Assets will be marshalled in favor of volunteers. *Keaton v. Miller*, 38 Miss. 630. Mrs. Maxwell is not a necessary party in order for Mrs. Lumpkin to obtain this relief. *Agricultural Bank v. Pallen*, 8 S. & M. 357. As against the four judgments first rendered, the injunction should have been perpetuated, because, as is admitted in the pleadings, they have been paid or discharged. *McAllister v. Clopton*, 51 Miss. 257. The proof cannot help the pleading, even if not paid. Executions under them have been levied upon other land sufficient in value to satisfy them. Since Davis admits they are discharged, he can have no relief as to them under his cross-bill. The only judgment in controversy therefore is the one recovered in September, 1866. We will consider separately the reasons why the prayer of our bill should be granted, and that of Davis's cross-bill denied.

II. The relief asked for by our bill should be granted for the following reasons:—

1. Maxwell was solvent on June 12, 1862, and had therefore the right as against his creditors, to give his daughter, Mrs. Lumpkin, the land in controversy. *Wilson v. Kohlheim*, 46 Miss. 346. By the instrument of that date, executed by him and his wife, which is a deed duly signed and sealed, he made the gift, intending, as the proof shows, that the title should vest at the time. Mrs. Lumpkin accordingly took possession, but the grantor held the deed for the benefit of the grantee, in order to perfect it, if necessary. This constituted a valid delivery. *Peters v. Jones*, 35 Iowa, 512; *Campbell v. Mayes*, 38 Iowa, 9; *Tallman v. Cooke*, 39 Iowa, 402; *Burkholder v. Casad*, 47 Ind. 418. As Mrs. Lumpkin produced the deed in court, it was necessarily delivered at some time, and such delivery related back to the date of its execution. *Irvine v. Irvine*, 9 Wall. 617; *Ins. Co. v. Colt*, 20 Wall. 560. But if not a deed, this was certainly a memorandum sufficient to take the case out of the Statute of Frauds, and was obligatory when Mrs. Lumpkin took possession. *Magee v. Catching*, 33 Miss. 672; *Whitworth v. Harris*, 40 Miss. 483; *Byrne v. Cummings*, 41 Miss. 192. The parties intended the title to pass.

Mrs. Lumpkin could have recovered the paper by detinue or replevin. Her father's sole object in retaining it was to make the deed in conformity with its stipulations.

2. The appellees are, however, in possession of the land ; and, although their title be weak, Davis cannot recover unless he shows a subsisting lien ; and, if Mrs. Lumpkin's title is void, the legal title to the land is in Maxwell's assignee in bankruptcy. *Allen v. Montgomery*, 48 Miss. 101 ; *Stewart v. Isidor*, 1 B. R. 485 ; *Catlin v. Foster*, 3 B. R. 540. Davis's lien was imperfect when Maxwell was adjudicated a bankrupt : the bankrupt law preserves only liens *in esse* ; and the assignee's title is superior to Davis's lien. *In re Hinds*, 3 B. R. 351, 355 ; *In re Dey*, 3 B. R. 305 ; *In re Bininger*, 3 B. R. 481 ; *Miller v. Sherry*, 2 2 Wall. 237 ; *Ashley v. Robinson*, 29 Ala. 112, 125 ; *Fetter v. Cirode*, 4 B. Mon. 482 ; *Botts v. Patton*, 10 B. Mon. 452 ; *In re Sabin*, 12 B. R. 142. When the bankrupt is discharged he is no longer personally liable, and the creditor cannot proceed against his fraudulent transferee. *Hubbell v. Flint*, 15 Gray, 550 ; *Graham v. Pierson*, 6 Hill, 247 ; *Crouch v. Gridley*, 6 Hill, 250 ; *Ruckman v. Cowell*, 1 N. Y. 505 ; *Clark v. Rowling*, 3 N. Y. 216 ; *Comstock v. Grout*, 17 Vt. 512 ; *Harrington v. McNaughton*, 20 Vt. 293. Where the creditors of a fraudulent transferee seize the property fraudulently transferred, the creditors of the fraudulent transferor cannot assert any claim against it to their detriment. *Gibbs v. Chase*, 10 Mass. 125. The case of *Clark v. Rowling*, *ubi supra*, is indorsed by our own court in *McDonald v. Ingraham*, 30 Miss. 389.

3. But as the title was in Maxwell's assignee in bankruptcy for the benefit of Maxwell's general creditors, he was entitled to his day in court to show cause, if any he could, why execution should not be issued against the estate. The principle is universally recognized, and is applicable to heirs on judgments recovered against their ancestor, or to purchasers on judgments recovered against their grantors prior to the grant. When a new party is to be charged on execution, a *scire facias* must be issued. *Smith v. Winston*, 2 How. 601 ; *Dejarnett v. Haynes*, 23 Miss. 600 ; *Hughes v. Wilkinson*, 37 Miss. 482 ; *Cocke v. Foote*, 49 Miss. 181 ; *Ex parte Foster*, 2 Story, 181. Maxwell

was *civiliter mortuus*, and if the execution was a continuance of the original suit, then by the express letter of the Bankrupt Act the bankrupt should have been replaced by his assignee before it could be proceeded with.

4. The execution must be enjoined, because the court issuing it had no jurisdiction over the subject-matter or the estate of Maxwell at that time. The first section of the Bankrupt Act of 1867 provides that the Bankruptcy Court shall have jurisdiction to ascertain and liquidate liens on the bankrupt's estate. If this jurisdiction is concurrent with that of the State court, yet the property was in the custody of the Bankruptcy Court. High on Receivers, § 50; *Zeigler v. Shomo*, 78 Penn. St. 357, 363; *Davis v. Anderson*, 6 N. B. R. 145; *Phelps v. Sellick*, 8 B. R. 890. Being in the custody of the Bankruptcy Court, the Circuit Court of Tippah County had no right to issue the execution. *Taylor v. Carryl*, 20 How. 583. The law is ably discussed, and this question directly decided in our favor, in the following cases and text-books: *Stemmons v. Burford*, 39 Texas, 352; *Blum v. Ellis*, 73 N. C. 293; *Withers v. Stinson*, 79 N. C. 841; *The Skylark*, 4 Biss. 388; *In re Paine*, 17 B. R. 37; Bump on Bank. (10th ed.) 211, 623; Herman on Executions, 40; *Allen v. Montgomery*, 48 Miss. 101; *Jones v. Leach*, 1 B. R. 595; *McDougald v. Reid*, 5 Ala. 810; *Brown v. Branch Bank*, 20 Ala. 420; *Alcott v. Avery*, 1 Barb. Ch. 347.

III. Davis's cross-bill should have been dismissed.

1. Because, to obtain the relief asked, Davis must show that his judgment is a lien upon the land. *Farned v. Harris*, 11 S. & M. 366; *Brown v. Bank of Mississippi*, 31 Miss. 454; *Partee v. Mathews*, 53 Miss. 140. Davis has no lien if the deed to Mrs. Lumpkin is not fraudulent; and, if it is fraudulent, the title vested in the assignee, unincumbered by the possibility of Davis asserting any lien. The assignee acquires the title of a *bona fide* purchaser for valuable consideration without notice, for, in consideration of the assignment to him, Maxwell's creditors released their debts. *Soule v. Shotwell*, 52 Miss. 236.

2. Even, however, if Davis is entitled to the relief asked by his cross-bill, the Chancery Court has no jurisdiction to grant it after bankruptcy: the assignee alone can maintain a bill to

set aside the bankrupt's fraudulent conveyance. *In re People's Mail Steamship Co.*, 2 B. R. 552; *In re Davis*, 2 B. R. 391; *Jones v. Leach*, 1 B. R. 595; *Pennington v. Sale*, 1 B. R. 572; *In re Snedaker*, 3 B. R. 629; *Stuart v. Hines*, 6 B. R. 416; *Markson v. Heaney*, 4 B. R. 510; *In re Wynne*, 4 B. R. 23; Bump on Bank. §§ 324, 325, 326. The assignee may sue in the State courts, but he cannot be sued there. The property being in the custody of the Bankruptcy Court, the State court cannot invade its jurisdiction. The assignee cannot be dragged into the State court. Then, reviewing the decisions cited by opposing counsel, counsel contended that none of the cases contemplated the commencement after bankruptcy of a proceeding to enforce a lien.

3. But, however it may have been under the original Bankrupt Act, the Revised Statutes of the United States, passed in 1873, by §§ 563, 711, 4972, confer exclusive jurisdiction on the United States Courts of all matters and proceedings in bankruptcy. *McHenry v. La Société Française*, 95 U. S. 58; *Sherwood v. Burns*, 58 Ind. 502; *Wente v. Young*, 17 B. R. 90. Davis is not protected by U. S. Rev. Stats. § 5597. The repeal of a statute terminates all proceedings under it. *Musgrove v. Vicksburg Railroad Co.*, 50 Miss. 677. To meet that rule, § 5597 was passed, and before Davis can bring himself within its benefit he must show the Federal statute which gave him the right to the remedy he was pursuing, and which was repealed by the Revised Statutes. Davis was, however, proceeding in a Mississippi court, and under Mississippi law.

4. Davis was barred of all remedy. Before the assignee was made a party to this suit, his right to set aside the fraudulent conveyance was barred by the two years' Statute of Limitations provided by the bankrupt law. U. S. Rev. Stats. § 5057. Davis cannot effect more by the assignee's rights than the assignee could effect himself. *Brown v. Goolsby*, 84 Miss. 437; *Lagow v. Neilson*, 10 Ind. 183; *Crofford v. Cothran*, 2 Sneed, 492. Apart from the Statute of Limitations, the act making the jurisdiction of the Bankruptcy Court exclusive had taken effect before the assignee was made a party to the suit, and therefore the equitable exception, allowing the creditor to proceed for himself when the assignee refuses to proceed against the fraud-



ulent conveyance, cannot help Davis. The fundamental principle of the bankrupt law is the equal distribution of the bankrupt's assets among his creditors, which is impossible if either the bankrupt or any of his creditors can enforce their claims outside of the Bankruptcy Court. The State court has no jurisdiction of a bill filed by a mortgage or lien creditor of the bankrupt, unless the assignee is a party to such bill; and then equity will treat the assignee as complainant, for the purpose of effecting the ends of justice. Story Eq. Pl. § 516; *Freeland v. Holloman*, 9 B. R. 331; *Bank v. Cooper*, 20 Wall. 171; *Allen v. Montgomery*, 48 Miss. 101; 1 Dan. Ch. Prac. 59, 60; Bump on Fraud. Conv. (4th ed.), 519, 520; *Pratt v. Curtis*, 6 B. R. 139; *Edwards v. Coleman*, 2 Bibb, 204; *Bradshaw v. Klein*, 1 B. R. 542; *In re Metzger*, 2 B. R. 355; *Goodwin v. Sharkey*, 3 B. R. 558; *Thurmond v. Andrews*, 13 B. R. 157; *Alsabrooks v. Cates*, 5 Heisk. 271; *Winters v. Claitor*, 54 Miss. 341; *Lawrence v. Hand*, 23 Miss. 103; *Foster v. Pugh*, 12 S. & M. 416; *Hoe v. Wilson*, 9 Wall. 501; *Railroad Co. v. Orr*, 18 Wall. 471; *Manly v. Kidd*, 38 Miss. 141; *Gifford v. Helms*, 98 U. S. 248; *In re Sabin*, 9 B. R. 383.

IV. Reviewing the evidence, the counsel also contended that the title of Mrs. Lumpkin to the land in controversy was *bona fide*; that the facts showed that Maxwell was solvent at the time of the execution both of the deed of 1862 and of that of 1867; that there was enough property besides the land in controversy to pay not only Davis but all Maxwell's other creditors; that the deed of 1867, being made when the deed of 1862 was lost, related back so as to validate the former conveyance; that the gift of the land, which was but a small part of Maxwell's estate, was good as an advancement from a solvent father to his daughter on the occasion of her marriage; and that upon the merits of the case, apart from the questions of jurisdiction and of limitation, Mrs. Lumpkin was entitled to the land, as against both Davis and her father's assignee.

CAMPBELL, J., delivered the opinion of the court.

The right of Mrs. Lumpkin must be determined with reference to the deed of April 17, 1866, by which the land was

conveyed to her. The paper of June 12, 1862, had no effect, for want of delivery; and this "memorandum," as it was called and treated by the parties, and the taking possession of the land, and every thing which preceded the execution of the deed of April 17, 1866, must go for nothing. The deed of April 17, 1866, was void as to the creditors of the grantor. It was voluntary, and the grantor was not in a pecuniary condition to make gifts. His liabilities far exceeded his assets. This deed being void, the land conveyed by it was subject to the lien of judgments against the grantor, as if it had not been made. As to them, it is to be considered as not existing. *Pulliam v. Taylor*, 50 Miss. 551; *Thomason v. Neeley*, 50 Miss. 310; *Shaw v. Millsaps*, 50 Miss. 380.

The subsequent bankruptcy of the judgment debtor did not affect the lien of judgments against him. These liens exist by the law of the State, and are preserved unimpaired by the bankrupt law. The discharge of the bankrupt discharges him personally from judgments, but the lien of a judgment against him which had attached to property before the adjudication in bankruptcy is still a lien. The appointment of an assignee, and the assignment to him in pursuance of the law, vest in him the property of the bankrupt, but in the precise condition it was in at the time of the adjudication. He stands in the shoes of the bankrupt, and takes property subject to all liens and equities which could have been enforced against it if bankruptcy had not occurred. *Yeatman v. Savings Institution*, 95 U. S. 764; *Russell v. Cheatham*, 8 S. & M. 703; *Talbert v. Melton*, 9 S. & M. 9; *Winters v. Claitor*, 54 Miss. 341; *Reed v. Bullington*, 49 Miss. 223. The bankruptcy of Maxwell did not hinder the enforcement of the lien of a judgment against him by execution. The sale of property bound by the lien of a judgment does not affect the right of the judgment creditor to seize and sell it. Being subject to the lien, it may be seized and sold as the means of making the lien available. *Crowe v. Reid*, 57 Ala. 281; *McHenry v. La Société Française*, 95 U. S. 58.

The assignee in bankruptcy may draw the matter of adjusting all liens into the District Court of the United States, and himself sell the property, and apply the proceeds under the direction

of said court ; but if he finds that the property is so incumbered as to consume its full value in discharging liens to which it is subject, and, therefore, that there is nothing in it for general creditors, he may decline to have any thing to do with it ; and in that case the enforcement of the liens by judgment creditors, by the process of the State courts, is not an invasion of the jurisdiction of the courts of the United States, or in contravention of the provisions or the policy of the bankrupt law. *Pressly v. Ellis*, 48 Miss. 574. Nor do we think that § 711 of Revised Statutes of United States makes any difference in this respect, both because of the fact that this suit was pending (Rev. Stats. § 5597), and because this contest is not a matter in bankruptcy.

In this case, the bankruptcy occurred in 1868, and the appointment of an assignee and the assignment to him near the close of the year 1869. This bill was filed in 1869, soon after the levy of the execution on the land. The assignee was made a party to the suit in 1875. He has never appeared, nor has he sought by proceeding in the court of the United States to interfere with the land or the litigation about it, as we must assume from the continuance of this litigation. All claim by the assignee to attack the deed of April 17, 1866, has been barred by the two years' limitation of the Bankrupt Act. It is manifest that the assignee has no interest in this controversy, and no concern about it, and that he has acquiesced in this effort of the judgment creditor to obtain satisfaction of his judgment by a sale of the land. And Mrs. Lumpkin cannot make the non-action of the assignee, and lapse of time, as against him, a shield from the attack of Davis, whose right as against her is independent of the assignee. The abstinence from the contest of the assignee leaves Davis's way clear of all obstructions ; and the fact that the assignee has lost all right to contest the claim of Mrs. Lumpkin, frees the contest between herself and Davis from any other question than that of its merits, and that we have resolved in favor of Davis.

No case is presented for marshalling assets, as it does not appear that the execution levied on the land in controversy in this suit can be satisfied, in whole or part, out of other lands conveyed by Maxwell, after April 17, 1866.

We recognize the rule that a prior grantee, has the right to insist on the devotion of different parcels of property to the satisfaction of a lien to which all are subject in the inverse order of their alienation, so that the property conveyed by the debtor last in point of time shall be first applied to discharge the lien; but he who seeks to divert a lien creditor from himself to another source of satisfaction to which he should resort, must show clearly an unobstructed source of obtaining such satisfaction. Protecting himself by presenting another for the sacrifice, he must present one equal to the burden he would shift from himself to him. The other lands to which the complainant would direct the execution creditor have been levied on by other executions, and are the subject of an adverse claim by Mrs. Maxwell, and of serious litigation between her and the judgment creditor.

We do not regard the answer of Davis, as to the judgments alleged to have been paid, as authorizing the conclusion on the hearing that the allegation of the bill to that effect is to be taken as true. The answer was sufficient, under the circumstances it discloses, to prevent the operation of Code 1871, § 1024. It states that the judgments, other than that the execution on which was levied on the land claimed by the complainant, were the subject of another suit, in the same court, between the respondent and another, and that all the facts in reference to those other judgments were set forth in the answer of the respondent in that suit; which answer he refers to and adopts in this, as to such judgments. There was no exception to the answer for insufficiency or irrelevancy. The record shows that the judgments were not in fact paid; and a rule of practice, created for convenience, should not be perverted to injustice, as would be done by maintaining the view contended for by counsel for the appellees on this matter. Davis is entitled to the relief sought by his cross-bill.

*Decree reversed, and cause remanded for decree.*

## H. G. DARCY ET AL. v. G. A. SPIVEY, ASSIGNEE.

1. ATTACHMENT. *Bankruptcy of defendant. Assignee's rights.*

The assignee of a bankrupt, who has become a party to an attachment sued out against the latter before his adjudication, can, if a plea in abatement of the writ is sustained, recover damages on the bond in right of the bankrupt, under Code 1871, ch. 13, art. 10.

2. SAME. *Bond. Damages. Verdict. Remittitur.*

If the damages awarded by the jury against the plaintiff in attachment are excessive, the assignee can remove the objection by entering a remittitur.

8. INSTRUCTIONS. *Supreme Court. Immaterial error.*

Erroneous charges are no ground for reversal, if more favorable to the plaintiff in error than the law warrants.

ERROR to the Circuit Court of Leflore County.

Hon. W. COTHRAN, Judge.

The plaintiffs in error are the obligors in a bond, which they executed in suing out an attachment against J. R. Bew, on an affidavit that he had fraudulently disposed of his property. Goods were seized and sold by the sheriff as perishable. On the trial of the plea in abatement, filed under Code 1871, ch. 13, art. 10, the court charged that if the defendant had given the plaintiffs reasonable ground to believe the facts stated in the affidavit, the jury should sustain the writ, 'that they were not to consider in making up their verdict the fact that the defendant had been adjudicated a bankrupt, and that they should award only such damages as the defendant proved he had actually sustained. The jury found that the attachment was wrongfully sued out, and awarded excessive damages, but the defendant's assignee in bankruptcy, who had previously become a party to the suit, remitted the recovery down to the actual difference between the value of the goods seized and the price realized for them at the sheriff's sale.

*Outlaw & Coleman*, for the plaintiffs in error.

The question presented on the plea in abatement is not whether the facts stated in the affidavit are true or false, but whether the attachment was wrongfully sued out. *Cocke v. Kuykendall*, 41 Miss. 65. When the affidavit is based upon

facts fully justifying it, and learned from the defendant, he is estopped thereby to deny that the attachment was properly sued out. *Morgan v. Nunes*, 54 Miss. 308. The instructions which announce the contrary are erroneous. The fact that Bew was in bankruptcy was a material matter for the consideration of the jury in forming their verdict. The damages assessed by the jury were excessive, and the amount allowed after the *remittitur* was also excessive. Where it is conceded that there was no malice or intention to oppress on the plaintiffs' part, the damages, if any, should be limited to those actually sustained. *Myers v. Farrell*, 47 Miss. 281. Speculative profits on goods attached cannot be allowed.

*D. A. Outlaw*, on the same side, made an oral argument.

*T. C. Catchings*, on the same side, argued orally, and in writing, the propositions that the assignee in bankruptcy could not recover on the attachment bond, and that the damages were excessive; but the reporter has been unable to obtain his brief.

*Helm & Kimbrough*, for the defendant in error.

The verdict is warranted by the evidence, and the damages are not excessive. The instructions, which announce that if the defendant gave the plaintiffs ground to believe the truth of their affidavit the writ should be sustained, are all the plaintiffs could legally ask. The verdict, after the *remittitur*, embraces nothing but the actual loss on the goods sold by the sheriff. It is the exclusive province of the jury to determine in cases of wrongful attachment the *quantum* of the damages; and the court will not substitute its judgment for theirs, except when constrained by a grossly disproportionate allowance in the verdict. Bankruptcy, followed by the assignment, vests all the bankrupt's estate in the assignee, and an attachment bond has no characteristic which makes it an exception to the general rule.

GEORGE, C. J., delivered the opinion of the court.

After the attachment was sued out, and a plea in abatement filed, contesting the ground upon which the attachment was based, the defendant was declared a bankrupt; and his assignee, Spivey, appeared and caused the suit to be revived in his name.

The principal question for our consideration is as to the right of the assignee to recover damages on account of the right which existed in the bankrupt. The bankrupt's right to damages resulted from the attachment-bond in which he was obligee, and which was his property. This was a contract, and the damages recoverable under it are such only as arise from a breach of the contract. The bond covered all the damages which the obligee, now bankrupt, might sustain, and which he had a right to recover under the statute. An action on the bond is an action *ex contractu*, and not in any sense *ex delicto*. The damages defined in the statute are sustained by a breach of the contract. The fact that, without the statute and the bond, some of the damages mentioned in the former would be recoverable in an action *ex delicto*, can make no difference, since by the statute and the bond they are *ex contractu* rights. That the act which is a legal breach of the contract in the bond, is a tort, is equally without force, for the damages are due by contract; the proof of the tort is but proof of a breach of the contract. The attachment bond was the property of the bankrupt, and went to the assignee under the Bankrupt Act, which vests in the latter "all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto." The statute vested all the rights of the bankrupt in this bond in the assignee. If we hold that he can recover on it less than the bankrupt could, we deny him a right in the bond which the bankrupt had.

In placing the right of the assignee to recover in this case upon the ground of contract, we are not to be understood as holding that he may not recover for torts committed against the bankrupt. As to that we express no opinion, though there are several cases in which the right of the assignee to recover for torts has been held to pass to his assignee. *Comegys v. Vasse*, 1 Peters, 198; *Phelps v. McDonald*, 2 MacArthur, 875; *Williamson v. Colcord*, 13 B. R. 319.

There are errors in the charges to the jury; but they are even more favorable to the plaintiffs than the law warrants. *Roach v. Brannon*, ante, 490. No error is found in the record for which the judgment should be reversed. The objection

that the verdict was excessive is removed by the *remittitur*, and the plaintiffs in error cannot complain of the erroneous instructions, because they did them no injury.

*Judgment affirmed.*

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MATTIE JOHNS v. JAMES R. JOHNS.

1. DIVORCE. *Cruel treatment. Personal violence.*

Persistently cruel and inhuman treatment, occasionally characterized by personal violence, so as to beget the apprehension that it will occur again whenever fury impels the offender, is, under Code 1871, § 1767, cause for a divorce from the bond of matrimony.

2. SAME. *Infant children. Custody.*

On granting the divorce, the custody of the infant children of the marriage should be given to the mother, if they are so young as to need her care and attention.

APPEAL from the Chancery Court of Jefferson County.

Hon. THOMAS Y. BERRY, Chancellor.

The appellant filed this bill against the appellee, her husband, for a divorce upon the ground of habitual, cruel and inhuman treatment, and further alleging that she was devoted to her two little children with that love and affection that only a mother can know and feel, that she was able and willing, and desirous above all else in the world to maintain, support, provide for and cherish them, that her husband, who drove her away by threatening to kill her, and who retained the children, was, owing to his inability to provide, and his wicked, debased and desperate character, unfit to have their custody, and that owing to the tender years of the infants, she was the only one who could give them the care and attention which they needed, prayed, in addition to the decree of divorce, that the court would decree the care, custody and maintenance of the children to her. The appellee answered, denying the allegations, proof was taken, and, on final hearing, the chancellor dismissed the bill.

*J. J. Whitney*, for the appellant.

The Chancellor refused the divorce on the ground that the



appellant could not prove the personal violence to be as frequent as the other inhuman treatment. Such a construction renders it impossible to obtain a divorce on this ground. The statute must be reasonably construed. The language, "habitual, cruel and inhuman treatment," in Code 1871, § 1767, must have some meaning, otherwise the ground provided by the legislature would have been "constant personal violence." Such husbands are not in the habit of calling witnesses to their cruel acts. In a case like this, it would be not only inequitable, but inhuman, if the law gave no relief.

*Thomas Reed*, on the same side.

The evidence showed that the husband's treatment of his wife was not only habitually cruel and inhuman, but was also frequently marked by personal violence. The Chancellor evidently misconstrued Code 1871, § 1767. By dismissing the bill, she was deprived of her two infant children. Her ability to support them was fully shown, and owing to their tender age, they need her care. The father is manifestly an unfit custodian. By a long continuance of ill-usage, culminating in the violent threat which drove off his wife, he has exclusive control of the children, who should be restored to a mother's care.

No counsel for the appellee.

CAMPBELL, J., delivered the opinion of the court.

"Habitual, cruel and inhuman treatment, marked by personal violence," is cause for a divorce from the bond of matrimony. Code 1871, § 1767. The clause, "marked by personal violence," defines the kind or degree of treatment which is cause for a divorce. Cruel and inhuman treatment, practised by one of the married parties towards the other, with such persistency as to have become the accustomed conduct of the party, and which is characterized by "personal violence," entitles its victim to a divorce. This treatment must be *habitual*. A single act of violence ordinarily would not suffice. It might never be repeated. It need not have been frequent. It is not necessary for personal violence to attend the daily intercourse of the parties. If the treatment is persistently cruel and inhuman, and it is occasionally characterized by personal violence, *so as to beget the apprehension that it is liable*

to occur again at any time, when the fury of passion may impel the offender, it is sufficient. Prior to the statute, such cruelty was ground for a divorce *a mensa et thoro*. *Kenley v. Kenley*, 2 How. 751. 1 Bish. Marriage and Divorce, § 715 *et seq.*

These parties were married in 1872, and in 1873 they had a temporary separation, after blows inflicted on the wife by the husband. A reconciliation took place, and the parties lived together, with much unhappiness, as is shown, until January 15, 1878, when the wife left her husband, and soon afterwards exhibited her bill for a divorce. The evidence shows a want of congeniality between these parties, from which it is probable their misery has sprung. The wife is shown to be affectionate, amiable and submissive. The husband is coarse, vulgar, profane, and wanting in affectionate regard for his wife. He was in the habit of wounding her feelings; often cursed her; sometimes kicked her implements of industry about the house or out of doors, in his fury; and twice in 1877, as the evidence shows, struck and choked her! What promise of good results is there from a continuance of the marriage relation between these parties? Judging the future by the past, it can result only in continued unhappiness, with a just apprehension, on the part of the unoffending wife, of being the victim of the fury of her husband in moments of anger, liable at any time to be inflamed by the most trivial circumstance, and to find expression in personal violence to her. The law does not doom her to such a state of continual dread. The "habitual, cruel and inhuman treatment, marked (in several instances) by personal violence" of her husband towards her, entitles her to a decree severing the bond that binds her as wife to the husband who has so mistreated her.

The fruits of this unfortunate marriage are two children, one about four years old, and the other about two years of age. They should be with their mother. They need her care and attention. They would have been with her but for the breach of his marital duties by their father, which drove the mother from her home. The decree will be reversed and cause remanded for a decree to be entered granting a divorce and awarding the custody of the children to the appellant.

*So ordered.*

## FRANK WALTON v. THE STATE.

CRIMINAL LAW. *Murder. Fixing penalty. Instructions.*

Under the act of March 4, 1875 (Acts 1875, p. 79), empowering the jury to declare in their verdict, convicting any person of a capital crime, that the punishment shall be imprisonment for life, it is not enough to instruct them of their power, but their verdict will be set aside unless they are informed that, if they do not so declare, the sentence will be that of death. CHALMERS, J., dissented.

ERROR to the Circuit Court of Wayne County.

Hon. J. S. HAMM, Judge.

On the trial of this indictment for murder, the counsel for the defendant asked the court to charge that "if, after carefully considering all the evidence, the jury find the defendant guilty as charged, beyond all reasonable doubt, they may, in their discretion, declare in their verdict that the penalty or punishment shall be imprisonment for life in the penitentiary. But, if the jury should omit to so declare the penalty in their verdict, the court shall pronounce the death penalty." The court refused to give that instruction for the defendant, but gave the following for the State: "If the jury, from the evidence, should find the defendant guilty, and such should be their verdict, then they may, if they think proper, declare the penalty to be imprisonment for life in the penitentiary. But if they, while concurring in and agreeing to a verdict of guilty, cannot agree as to adjudging the penalty to be imprisonment for life, then they shall return a verdict of guilty as charged in the indictment." The verdict was: "We, the jury, find the defendant guilty as charged in the indictment;" and, thereupon, the defendant moved for a new trial, upon the ground that "the law, in its mercy, gives the jury the right, under the statute of 1875, to find the defendant guilty, and to recommend in their verdict that he shall be imprisoned in the penitentiary for life, and the court erred in refusing the charge asked by the defendant and substituting the one given by the court." The court overruled the motion, and sentenced the prisoner to be hanged.

*J. L. Morris*, for the plaintiff in error.

The instruction, which informed the jury of the effect of their failure to fix the punishment in the language of the statute (Acts 1875, p. 79) should have been given. But the court, adopting certain expressions in the case of *Green v. State*, 55 Miss. 454, charged the jury, if they could not agree on the penalty, to find a general verdict of guilty. They did not understand that by such a verdict they were inflicting the death penalty, but, as the charge informed them that the punishment was discretionary, they naturally supposed that the court, in case of their disagreement, had power to sentence to imprisonment.

*T. C. Catchings*, Attorney General, for the State.

There is nothing whatever in the objection made by the plaintiff in error. The instruction for the State fully informed the jury as to their right to commute the death penalty, and nothing more could be demanded of the court.

GEORGE, C. J., delivered the opinion of the court.

The plaintiff in error was convicted of murder and sentenced to death. He asks for the reversal of this judgment because the court refused to give an instruction to the jury informing them that, in case they failed to affix to his crime the punishment of confinement for life in the State Penitentiary, then it was the duty of the court to impose on him the penalty of death. We think the court erred in refusing the charge.

It is true that when the question submitted to a jury is alone as to the guilt or innocence of the accused, they have nothing to do with the punishment to be inflicted, in case they render a verdict of guilty. Their duty is simply to find the fact of guilt or innocence, according to the evidence before them, and a charge from the court as to the punishment to follow conviction could have no other effect than to deter them from discharging their duty. But in this case, that was not the sole question submitted to the jury. They are invested by law with the power, and charged with the duty, of determining which of two punishments shall be inflicted. It is true, the statute does not in express terms say that they shall choose between the two punishments; but such is its necessary mean-

ing and effect, for the failure to choose one of them necessarily imposes the other. A failure expressly to choose one is a necessary though tacit choice of the alternative. The duty, or privilege, if that term is preferred, of choice between two, necessarily involves the idea of knowledge as to the alternatives about which the choice is to be exercised. Certainly the legislature did not intend that there should be a blind and unreasoning choice, but a careful, intelligent and discriminating selection. It is impossible to conceive that this could be done if the jury were ignorant of one of the two punishments between which they were to select. It was a necessary element, in determining whether the imprisonment for life should be inflicted, to know whether a milder or greater punishment might or must necessarily be inflicted, in case of their omission to affix imprisonment. The jury might have supposed that the punishment to be inflicted, in case of their failure to act, would be milder than imprisonment for life, and for that reason have failed to act; or their failure may be attributable to a belief on their part that, in that event, the punishment would be left to the discretion of the judge.

We are not authorized to assume, as an answer to this view, that the jury were well acquainted with the law condemning the prisoner to death in case they failed to impose imprisonment. It would very materially change the character and modify the functions of this court if our duty should be held to be, not to determine upon the legality of instructions asked by testing the principles stated in them by our knowledge of the rules of law, but by an inquiry, impossible of certain solution, as to how much or how little instruction the jury needed, based upon the further equally fruitless inquiry as to how much each individual juror might know. It is true that as to his business transactions and civil conduct, every man is presumed to know the law. This presumption we know, in most instances, to be false, and it is indulged in only from a necessity which mainly arises from the impossibility of determining how much or how little law any man knows. But the presumption is the contrary as to jurors, so far as it relates to principles of law applicable to the case before them, and about which the court is asked to charge them. As to these, they

are presumed to know nothing, and to derive all their knowledge from the court. If we consider, as we legally must, in determining the propriety of the charge refused by the court below, that the jury were ignorant of the law which made the infliction of the death penalty the only alternative of their omission to affix imprisonment for life, that they were called upon to decide between two punishments, one of which must necessarily be inflicted, and were kept in ignorance as to the nature and extent of one of them, the great wrong done the prisoner by the refusal of the instruction will be at once perceived. Certainly there can be no principle of law or public policy which could justify the condemnation of a man to death by a tribunal which was ignorant of the fact of condemnation when it was made.

We do not understand the view taken in the dissenting opinion to be that the instruction, if given, would have been improper, but that the judge is to be excused for the failure to give it because, on the modification of the charge, this part of it was inadvertently omitted, and that it is incredible that the jury should have been ignorant of the law omitted to be stated to them. Inadvertence, however much it may be considered as an excuse for the non-performance of a legal duty, can never be held to be equivalent to performance, or to be a substitute therefor. The wrong to the accused is just as great, whether the failure to give the charge resulted from the innocent mistake of the judge or his wilful refusal. The belief that the jury could not have been ignorant of the law thus declined to be charged to them is equally unavailing. The question to be determined by us is not as to the extent of the knowledge of the jury, as to which we have no criterion whatever for forming an opinion, but as to the propriety of giving or refusing the charge, tested by the principles of law applicable to the case. That such a belief in their knowledge would be but a poor substitute for the actual imparting of this knowledge by a proper instruction is made evident when we consider that the choice of imprisonment for life may be prevented by one juror alone, and his ignorance may be the cause of his disagreeing with his fellows. Under the present system of selecting juries in this State, it is not incredible that one member, at least, of some one jury

might be ignorant of that or any other named principle of law. So far as we know, the fact that the jury were already well acquainted with the law has never been held a good answer to the objection that the court refused a legal and proper instruction, and we do not consider this a proper case in which to make a precedent of that kind, if we had the power.

*Judgment reversed and cause remanded.*

CHALMERS, J., delivered the following dissenting opinion.

The jury have nothing to do with the punishment which the law affixes to a conviction of guilt, and the accused has no right to demand that they shall be instructed in regard to it. The punishment which the law affixes to the crime of murder in this State is death, and that punishment follows by operation of law upon a verdict of guilty. This punishment the jury may, if they elect so to do, commute into imprisonment for life. When they have been instructed by the court as to their prerogative in this regard, they have received all the information which the accused has a right to demand that they shall receive. In this case the court was requested to charge the jury that they might fix the punishment at imprisonment for life, if they thought fit, but that if they failed to specify their will in this respect, the death penalty would be inflicted. The charge failed to inform them what action they should take if they were unanimous in deeming him guilty, but failed to agree as to the punishment. The charge was therefore modified by the court, so as to announce to them the rule laid down in *Green v. State*, 55 Miss. 454, to the effect that, in such event, it was their duty to return a general verdict of guilty. In the modification, the statement, that if they failed to affix the punishment of imprisonment, the law affixed that of death, was omitted. I see no reason for its omission, nor do I see any legal right that the accused had to demand that it should be given. The jury were instructed that they could punish by imprisonment if they thought proper; but they declined to do so. I cannot think that any legal right of the prisoner has been violated, and it is simply incredible that the jury did not intend by their verdict that the penalty which the law affixes to a conviction of murder should follow.

CASES ARGUED AND DECIDED  
IN THE  
SUPREME COURT OF MISSISSIPPI  
AT THE  
APRIL TERM, 1880.

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GEORGE M. KLEIN *v.* GEORGE P. RECTOR.

1. *SALE. Rescission by seller. Fraudulent misrepresentations.*  
Misrepresentations by the buyer of goods as to his solvency, unless known by him to be untrue, and acted on by the seller under the belief of their truth engendered thereby, will not enable the latter to rescind a completed sale.
2. *SAME. Reclamation. Time and means.*  
If the buyer never had reasonable expectation of paying for the goods, the seller may reclaim them at any time before third persons' rights intervene, and by any means short of a breach of the peace.
3. *SAME. Representations of solvency. Subsequent failure.*  
Goods sold and delivered to a buyer, upon the statement of his son that he is solvent, cannot be reclaimed, although he soon afterwards fails and makes an assignment for the benefit of his creditors.
4. *SAME. Rescission by agreement. Re-delivery.*  
In order to revest the property in the seller, on rescission by mutual agreement, delivery and acceptance are as essential as in the original sale.
5. *SAME. Acceptance. Rights of third person.*  
Pointing out barrels said to contain liquor is not a sufficient delivery to complete the rescission of the contract as against the buyer's assignee, who obtains possession before the seller accepts them.

ERROR to the Circuit Court of Warren County.

Hon. UPTON M. YOUNG, Judge.

The defendant in error brought this action of trover for the conversion of three barrels of brandy and three of whiskey



against the plaintiff in error, who pleaded not guilty. On the trial, the plaintiff proved that Eric W. Wallin, a merchant of Vicksburg, applied to an agent of a foreign firm to fill an order for liquors, but they declined upon the ground that he was in failing circumstances; that, afterwards, his son, Ed. Wallin, came to the plaintiff, the fully empowered agent of Wood & Lea of St. Louis, Missouri, and asked him to fill the order, assuring him that his father was solvent; that he filled it, and the liquor, which was worth sixty dollars a barrel, was shipped to Eric W. Wallin, and received by him; that soon afterwards, hearing that Eric W. Wallin was about to make an assignment, the plaintiff went to his store, where he found both father and son, and told them that the debt was one of honor, and, as he had sold the liquor at Ed. Wallin's solicitation, they must protect him; that, after some consultation, they agreed to let him have the liquor, and called a clerk, who pointed out the barrels, and Ed. Wallin said, in his father's presence, "There they are—you can have them"; that the clerk shook the barrels, so that the plaintiff knew that there was some liquid in them, but it was not measured, and he did not know how much, or whether it was liquor; that the whiskey was the same which he had sold, but it was uncertain as to the brandy; that the plaintiff held an account against Eric W. Wallin, of which the liquor formed a part, and he intended to credit the bill thereon, but never did so, and nothing was said about it at the time; that, not knowing in what manner he was to receive the liquor, or how he was to have it marked, the plaintiff left, and went to see the United States Revenue officer to learn whether he could receive it in his own name or would have to take out a license, and the officer told him that the license of the house in St. Louis would cover the receipt of liquor here; that, after obtaining this information, the plaintiff returned to Wallin's store, where he found the defendant, Klein, in possession of all the goods in the store, holding by an assignment from Eric W. Wallin for the benefit of his creditors, and Klein refused to deliver the liquor, but afterwards sold it; that the plaintiff had no agreement with Wallin about holding the liquor for him while

he went to see the revenue officer, but supposed it would remain in his house until he came back. The demurrer of the defendant to the evidence was overruled by the court, and judgment was rendered for the plaintiff.

*Shelton & Crutcher*, for the plaintiff in error.

1. The defendant in error did not, in the exercise of a right springing from the fraud in obtaining the liquor, rescind the sale before the plaintiff in error obtained possession. The sale is not rendered void by the fraud, but is only voidable at the seller's election. Benjamin on Sales, §§ 433, 443. By attempting to recover the liquor, upon the ground that it was a debt of honor, and retaining the claim for the price which he proposed to credit when he received the liquor, he waived his right to rescind the sale, and confirmed it. The facts, however, are not such that the defendant in error could rescind the sale without the buyer's consent. It does not appear that the representations were false when made, or that they were made with the intention of obtaining the goods and not paying for them, or that they deceived the seller, and constituted the sole inducement to the sale, or that Ed. Wallin, who made them, was his father's authorized agent. Benjamin on Sales, §§ 429, 443; Wharton on Agency, 100. Subsequent ratification adopts only such of the agent's acts as the principal had knowledge of. Wharton on Agency, 65; *Lee v. West*, 47 Ga. 311. While the assignee, under the general assignment, takes subject to all equities, the defendant in error cannot now, after the liquor has been sold, assert, for the first time, a right to rescind. *Wickham v. Martin*, 13 Gratt. 427; Benjamin on Sales, § 433.

2. There was no resale or rescission by mutual agreement before the execution of the deed of assignment. The legal title and possession being both with Wallin, he could only re-vest the title in the defendant in error so as to defeat the assignee's claim, by such proceedings as would give a purchaser the right of immediate possession under the Statute of Frauds. When the defendant in error left the store to see the revenue officer, the re-sale was incomplete under Code 1871, § 2895. A delivery, or payment or security of the purchase-money was essential. The intention to credit Wallin for

the liquor on his account with the defendant in error is not enough to take the case out of the statute. Benjamin on Sales, § 193. There was no delivery and receipt of the goods, for they never passed from Wallin's control, and the defendant in error was not prepared to accept them. Benjamin on Sales, §§ 180, 187; *Daniel v. Frazer*, 40 Miss. 507. The assignee's right became perfect before the defendant in error acquired title.

3. The expression, used by the counsel for the defendant in error, that the demurrer admits everything which the evidence tends to prove, is inapplicable to a demurrer to evidence. The facts set out in the demurrer constitute what is admitted on both sides to be the facts in the case. When the plaintiff joins in the demurrer, he admits that those facts are all that the evidence establishes. They stand as the allegations of a plea which is demurred to. The demurrer admits only the allegations, and nothing more. *Ware v. McQuillan*, 54 Miss. 703.

*S. M. Shelton*, on the same side, argued orally.

*Pittman, Pittman & Smith*, for the defendant in error.

1. As this is a demurrer to the evidence, it is unnecessary that the facts should be proved expressly, if by fair inference they result from the evidence in the case. A demurrer to evidence admits all facts which the evidence may tend to prove. *Mobile Railroad Co. v. McArthur*, 43 Miss. 180; *Young v. Black*, 7 Cranch, 565. The object of a demurrer to evidence is to question the relevancy of the evidence on one side, and make that question the sole point on which the issue of fact is to be determined. Gould's Pleading, § 47. The party demurring admits every conclusion to which his adversary's evidence conduces. *Fowle v. Alexandria*, 11 Wheat. 320. It is rarely a safe proceeding, for it admits the truth of the evidence demurred to, and all just inferences which can be drawn therefrom. 4 Minor's Institutes, 749.

2. The evidence shows that the contract by which Wallin obtained possession of the liquor was induced by fraudulent representations as to his solvency, and as soon as Rector learned that they were untrue, and before the rights of any innocent person had intervened, he took prompt steps to

disaffirm the sale. The son, who was the father's agent to make the purchase, could scarcely have exceeded his authority in representing the proposed buyer as solvent. As a man is presumed to intend the natural and probable consequences of his own acts, Wallin, purchasing when insolvent, will be presumed to have intended never to pay for the goods. *Load v. Green*, 15 M. & W. 216; *Mulliken v. Miller*, 8 Cent. Law Journ. 429. The fact that Rector has never credited the account with the barrels of liquor is due to the further fact that he never recognized the debt. He promptly disaffirmed the contract of sale, and does not admit that Wallin owes anything for the liquor, or that he owes Wallin for returning it. It is impossible for him to give stronger evidence of considering the original sale null.

8. The evidence shows a rescission by mutual agreement, and delivery of the liquor in pursuance thereof. When Rector told the Wallins that they must protect him, they understood that to be a demand for the barrels, for, after consultation, one of them said, "There they are—you can have them." The contract and delivery were complete. Rector made an unconditional offer, and Wallin accepted the offer and carried out his acceptance. Benjamin on Sales, §§ 38, 39. There was such a delivery as the property, from its nature, was susceptible of. Benjamin on Sales, § 696. The barrels were ascertained, pointed out and specifically delivered. *Baldwin v. McKay*, 41 Miss. 358. The offer to receive came from Rector, and was accepted by Wallin; and nothing more was to be done to put the liquor at Rector's risk if destroyed. Evidently both parties intended to declare the sale rescinded, because of the peculiar circumstances under which it was made, and that the liquor delivered should then and there be in satisfaction of the debt contracted for it.

*M. F. Smith*, on the same side, made an oral argument.

CHALMERS, J., delivered the opinion of the court.

The plaintiff's right to recover was rested upon two grounds: 1st., that there had been such fraud practised upon him by the vendee in the sale of the goods as entitled him to rescind the contract and reclaim the goods at his election, and in

*invitum* as to the vendee ; 2d, that there was in fact an actual rescission and re-investiture of title in him, by mutual agreement between himself and the vendee, before the rights of the assignee of the latter intervened.

In order to give to the vendor of personal property the right of his own motion to declare the contract at an end, and reclaim the property, where the sale has been completed and delivery has taken place, there must be shown such fraud upon the part of the purchaser as will fall but little, if at all, short of supporting a prosecution for obtaining goods under false pretences. It is essential that the representations claimed to be fraudulent should have been untrue in point of fact, should have been known to be such by the party making them, and should have been acted upon by the seller under the belief thereby engendered that they were true.

It is sometimes said that the circumstances must be such as to warrant the belief that the purchaser never intended to pay for the goods, or could have had no reasonable expectation of so doing. Where such a state of facts exists, the seller may reclaim the property at any time before the rights of third persons have intervened, and by any means short of a breach of the peace. *Benjamin on Sales*, § 429 *et seq.* ; *Hodgeden v. Hubbard*, 18 Vt. 504 ; *Johnson v. Peck*, 1 Wood & M. 384 ; *Rowley v. Bigelow*, 12 Pick. 306. The testimony demurred to here neither proves nor tends to prove this state of facts. It appears only that the goods were sold in consequence of representations, made by the son of the purchaser, that his father was solvent, and that shortly afterwards, — how long is not shown, — the purchaser failed in business and made an assignment for the benefit of his creditors. We cannot from this meagre proof infer the existence of a state of facts that would warrant a reclamation of goods once delivered, the title to which had become absolute in the purchaser.

Neither can the judgment of the court below be supported upon the theory that there was a mutual rescission of the contract of sale and a re-investiture of title in the seller before the execution of the general assignment to creditors. When parties agree to rescind a sale once made and per-

fect, the same formalities of delivery and acceptance are necessary to re-vest the property in the original vendor which were necessary to pass it in the first instance from him to the vendee. *Quincy v. Tilton*, 5 Greenl. 277; *Miller v. Smith*, 1 Mason, 437. There was in this case no delivery at all. There was a contract to re-sell or rescind, but before it was made effective by a delivery, either actual or constructive, it was broken up by the general assignment, and the goods were taken possession of by the assignee.

*Judgment reversed, and judgment here sustaining the demurrer.*

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A. A. TAYLOR v. E. MOSELY.

**RESULTING TRUST. Notice. Possession. Mortgage by trustee.**

A resulting trust in favor of a person who occupies land as a residence, in the belief that the title is in himself, will prevail over a mortgage for loaned money executed by the trustee, whose legal title is recorded.

APPEAL from the Chancery Court of Lauderdale County.

Hon. GEORGE WOOD, Chancellor.

*Thomas H. Woods*, for the appellant.

Having allowed the legal title to stand in his son's name upon the record until credit was extended upon the faith thereof, the father is now estopped to assert his secret equity against the mortgagee, who occupies the position of a purchaser in good faith. *Dickson v. Green*, 24 Miss. 612; *Nixon v. Corco*, 28 Miss. 414; *Perkins v. Swank*, 48 Miss. 849. The occupancy of the father was not notice of title to the mortgagee. Possession under an unrecorded deed is notice to the vendor's creditors. *Dixon v. Lacoste*, 1 S. & M. 70; *Jones v. Loggins*, 37 Miss. 546. But possession is not notice of a resulting trust. In the nature of things it cannot be. Notice of that kind puts a party on inquiry, which would have disclosed nothing under the circumstances of this case, as the legal title was in the son. Even if the mortgagee

had heard, in contradiction of the recorded deed, that the father's money paid for the land, that alone does not establish a resulting trust. *Walker v. Brungard*, 13 S. & M. 728; *Gibson v. Foote*, 40 Miss. 788. No title but the recorded one would have been disclosed. The bill does not present an equitable claim. This secret equity, based on undisclosed transactions long past, exclusively between father and son, and now openly asserted for the first time, in order to defeat a mortgage executed for loaned money, is a fraud, and its enforcement will be unjust.

*Frank Johnston*, on the same side.

Secret and implied equities are not favored in law, and are always reluctantly enforced against subsequent purchasers for value. It is inequitable to enforce the trust against the mortgagee under the circumstances of this case. Notwithstanding the appellee's occupancy, he permitted his son to record the legal title in his own name and act as owner. It is impossible to believe that these things were unknown to the appellee, without convicting him of unpardonable negligence, and, in either view, he cannot assert his latent equity to defeat the mortgage, with which his silence and non-action enabled the son to raise money. *Dewey v. Field*, 4 Met. 381; *Welland Canal Co. v. Hathaway*, 8 Wend. 480. A person is estopped who allows another to contract on the faith of a fact which he can contradict. *Gregg v. Wells*, 10 Ad. & El. 90; *Odlin v. Goye*, 41 N. H. 465. Silence will work an estoppel; it is not necessary for a party to act affirmatively. *Niven v. Belknap*, 2 Johns. 578; *Crest v. Jack*, 8 Watts, 238; *Keeler v. Vantuyte*, 6 Barr, 250; *Commonwealth v. Moltz*, 10 Barr, 527; *Woods v. Wilson*, 37 Penn. St. 379; *Miranville v. Silverthorn*, 48 Penn. St. 147. A person who has a claim against an estate and does not disclose it, but suffers the estate to be sold, is estopped. *Hill v. Epley*, 31 Penn. St. 331. It matters not that the complainant permitted this state of things ignorantly, or acted in ignorance of the title being in the son. A party's ignorance of the truth will not avail him, if it is the result of gross negligence. *Calhoun v. Richardson*, 30 Conn. 210; *Preston v. Mann*, 25 Conn. 118; *Hoxie v. Home Ins. Co.*, 32 Conn. 21; *Smith v. Newton*, 38 Ill. 230; *Beardsley v. Foot*, 14 Ohio St. 414.

*Evans & Smith*, for the appellee.

The land having been purchased with the money of the appellee, a resulting trust is implied from the facts of the case. Hill on Trustees, 146, 147, notes; Story Eq. Jur. §§ 1190, 1195. Such is the rule in this State. *Runnels v. Jackson*, 1 How. 358; *Mahorner v. Harrison*, 13 S. & M. 53; *Harvey v. Ledbetter*, 48 Miss. 95. To the same effect are the following cases: *Murphy v. Sloan*, 24 Miss. 658; *Winn v. Dillon*, 27 Miss. 494; *Fairly v. Fairly*, 38 Miss. 280; *Gibson v. Foote*, 40 Miss. 788; *Capers v. McCaa*, 41 Miss. 479; *McCarroll v. Alexander*, 48 Miss. 128. The same rule prevails elsewhere. 4 Kent Com. 306; *Holridge v. Gillespie*, 2 Johns. Ch. 30; *Dovoue v. Fanning*, 2 Johns. Ch. 252; 1 Lead. Cas. Eq. 591; Story on Agency, 200. The appellant is not an innocent purchaser. Possession, if sufficient to put the party on inquiry, was notice of the prior equity. Adam's Eq. 375; *Harper v. Reno*, 1 Freem. Ch. 323. It is notice of the occupant's title. *Dixon v. Lacoste*, 1 S. & M. 70; *Wilty v. Hightower*, 6 S. & M. 345; *Walker v. Gilbert*, 7 S. & M. 456; *Jones v. Loggins*, 37 Miss. 546; *Pope v. Pope*, 40 Miss. 516; *Perkins v. Swank*, 43 Miss. 349; *Parker v. Foy*, 43 Miss. 260; *Bell v. Flaherty*, 45 Miss. 694; *Strickland v. Kirk*, 51 Miss. 795.

CAMPBELL, J., delivered the opinion of the court.

The bill shows a resulting trust in favor of the complainant as to the land which is the subject of controversy, and that the complainant has had the actual occupation and exclusive dominion and control of the land since September, 1873, supposing the title to be in himself, and but recently has learned that his son, who made the investment for him, took the title in his own name instead of to the complainant, with whose money the purchase was made. The question is, whether the resulting trust in favor of the complainant, who actually occupied the land as his residence, shall prevail over the claim of the mortgagee, who loaned money and took a mortgage of the land from the son of the complainant, whose legal title was on record, at a time when the complainant was openly, notoriously and exclusively in the actual possession of the land?



The doctrine is firmly established in this State and elsewhere, that "open, notorious and exclusive possession of real estate, under an apparent claim of ownership, is notice to those who subsequently deal with the title, of whatever interest the one in possession has in the fee; whether such interest be legal or equitable in its nature." Wade on Notice, § 273; *Dixon v. Lacoste*, 1 S. & M. 70; *Hall v. Thompson*, 1 S. & M. 443; *Wilty v. Hightower*, 6 S. & M. 345; *Walker v. Gilbert*, 7 S. & M. 456; *Jones v. Loggins*, 37 Miss. 546; *Bell v. Flaherty*, 45 Miss. 694; *Claiborne v. Holmes*, 51 Miss. 146; *Loughridge v. Bowland*, 52 Miss. 546. There are some exceptions to the rule as thus stated, but this case is not within any exception. Counsel for the mortgagee contend that it was a fraud on the part of the complainant to permit the legal title to remain of record in his son, whereby he was enabled to obtain money on the faith of such title, and that the complainant should be estopped from setting up his secret equity against the mortgagee. The answer to this is, that the complainant's possession was notice of his claim, sufficient to lead to inquiry of him as to the nature of his possession, which, it must be assumed, would have led to correct information, whereby the mortgagee would have been advised of the right of the complainant, and, therefore, the mortgagee must be held to have had notice of the right of the complainant, and, having notice of such right, the claim of the mortgagee is subordinate to it. A possessor of land may be estopped under some circumstances from claiming that his possession is notice of his claim to the land; but the complainant in this case did nothing but occupy his own, — that for which his money paid, and which he supposed to have been conveyed to him. He is not estopped to claim his own against the mortgagee, who must be held to have known of his right, because she could have known by asking him, who to all appearances was owner.

*Decree overruling demurrer affirmed and cause remanded.*

## MARY S. SWAN ET AL. v. ISAAC SMITH.

1. **FRAUDULENT CONVEYANCE.** *Prior creditor. Partnership. Arbitration.*  
If partners submit the firm account for settlement to arbitrators, who decide that certain partnership debts shall be paid by one partner, he becomes, from the date of the award, a debtor to his copartner, within the purview of the statute against fraudulent conveyances.
2. **SAME.** *Judgment creditor. Principal and surety. Subrogation.*  
When a partner pays the judgments obtained by the firm creditors on the claims which by the award were to be settled by his copartner, the former is a judgment creditor and can maintain a bill to vacate a fraudulent conveyance executed by the latter.
3. **SAME.** *Chancery practice. Prevention of multiplicity of suits.*  
A bill filed when the complainant has only arranged to pay the judgment cannot be maintained, although he pays it before the hearing; but if before suit he has paid the other judgment which is embraced in the bill, the amount paid pending the suit may be embodied in the decree.
4. **SAME.** *Suit to vacate. Judgment. Estoppel.*  
If, under the award, a partner executes his due bill to his copartner, on which the latter obtains judgment, the former cannot set up, in the suit to vacate his fraudulent conveyance, frauds in the arbitration, of which he knew before judgment and failed without reason to assert.
5. **SAME.** *Priority of liens. Costs of suit.*  
Strangers who have paid off valid incumbrances upon the property fraudulently conveyed are entitled to be reimbursed; and if made parties defendant to the bill by amendment, they should be protected by the decree which orders the sale of the land.

APPEAL from the Chancery Court of Lincoln County.

HON. THOS. Y. BERRY, Chancellor.

Pierre Becker & Son were by the complainant, Isaac Smith, made defendants by an amendment to his bill upon the allegation that they had some equity in the land, to which his was superior. They answered, stating that they had paid a balance of the purchase-money due M. J. Whitworth, the vendor of Swan and James F. Smith, for the land in controversy, taking an assignment of his reserved lien, and also a sum due J. W. Bennett for taxes paid by him, taking an assignment of a mortgage executed to him upon the land by Swan and his wife, who had subsequently executed a deed of trust on the

land to secure the amounts paid by Becker & Son, and that they had also paid J. C. Hardy, the vendee of James F. Smith, an amount due him for part of the purchase-money by Mrs. Swan, and denying that they knew of the fraud, if any existed, claimed that their equity was superior to that of Isaac Smith. It further appeared that they had foreclosed the Whitworth lien, and Mrs. Swan had bought at the sale, and had paid her bid by giving Pierre Becker & Son the joint note of herself and husband, secured by their deed of trust on the land. The evidence tended to show that James T. Swan purchased the entire interest from Whitworth, using the names of James F. Smith and Hardy merely to vest title to a half interest in his wife, while he conveyed the other half to her directly.

*Sessions & Cassidy*, for the appellants.

1. There is no pretence that the Beckers' claims are spurious, or that they did not pay the balance of the purchase-money, and the sum to Hardy. It is not charged that they had notice of any fraud on Swan's part, and their assistance to Mrs. Swan was legitimate. *Fulton v. Woodman*, 54 Miss. 158. Hardy was not in debt, nor was his vendor. None of the judgments can reach the interest purchased from him. The property was bound for the purchase-money whether Swan was guilty of fraud or not. Pierre Becker & Son had a perfect right to purchase these superior liens, and give them to Mrs. Swan or any one else. Under this decree, the fraud of a debtor renders void not only his own conveyance, and that of a joint owner, but is equally fatal to the original vendor, whose lien it postpones until the general creditor Isaac Smith is satisfied. Whatever may be the result as to the other questions in the case, the decree must be reversed as to Mrs. Swan and the Beckers.

2. The complainant is in no event entitled to more than is due upon his individual judgment. He had not paid the Watson judgment when the bill was filed, and was therefore entitled to no relief thereon. As to the Erwin claim, if he is a creditor at all, he is a subsequent one. Isaac Smith at most was a general creditor of Swan to the extent that he actually paid out money for his use in satisfaction of these judgments. If the bill had been filed on the Watson and Erwin judgments

alone, it would have been demurrable. How, then, can relief as to those judgments be granted on the final hearing? The conveyance of the half interest in the land by Swan to his wife is not shown to be fraudulent, but if it was, that alone could be subjected, and then only to the individual claim.

3. The complainant is, however, entitled to no relief. As shown, the arbitration was partial, and results in defrauding Swan, who is really the creditor of Smith instead of his debtor. Swan's laches in complaining of the fraud might be a bar to granting him relief, but certainly Smith cannot claim the aid of a court of equity to enforce his fraudulent judgment. The court should have left the parties where it found them. Before, in any event, the court would be justified in pronouncing the decree it did, the evidence must show that Swan was indebted to Isaac Smith. This both Swan and his wife deny, and while as to Swan the judgment of Isaac Smith against him, if unimpeached, would be sufficient proof of this, yet as to Mrs. Swan and the Beckers, it would only be evidence of its rendition, they being neither parties nor privies. *Moore v. Cason*, 1 How. 53; *Gridley v. Denney*, 2 How. 820; *Freeman on Judgments*, § 162. Again, it is alleged in the cross-bill, and not denied by the answer, that a relation of trust and confidence existed between Isaac Smith and Swan, and that Isaac Smith took advantage of the confidential relation, and practised a fraud upon Swan. This, not being denied, is admitted, and the admission may be used as evidence to support Swan's answer. *Griswold v. Simmons*, 50 Miss. 137. Isaac Smith, then, having obtained a benefit from Swan during the existence of such admitted confidential relation, the presumption of law is that the settlement by which he makes Swan indebted to him is fraudulent, and the burden of showing its fairness is upon Smith. *Meek v. Perry*, 36 Miss. 190; 3 *Wait's Actions and Defences*, 444; 1 *Story Eq. Jur.* § 218.

*J. A. Brown*, on the same side.

There is a total failure to prove the allegation of the bill that Isaac Smith was a creditor of Swan prior to the conveyances to Mrs. Swan. A partner is not, by virtue of the partnership alone, the creditor of a copartner. Partnership is simply

a confidential relation. The power of a member of the firm to draw more than his share does not create the relation of debtor and creditor. The actual drawing must be proved. *Alston v. Rowles*, 13 Fla. 117. In this case a fair settlement of the affairs of the firm would clearly bring Isaac Smith in debt to Swan. But such settlement cannot be had on this bill which is not filed for that purpose. The award of the arbitrators, which was admittedly partial, and so states on its face, had not the effect of separating the three claims embraced in this suit from the remainder of the partnership affairs. No final settlement has yet been had between the partners, and therefore neither is creditor of the other. The date of the arbitration, vaguely stated in the bill as February, 1873, is negatived by the proof. In point of fact, it could not have occurred earlier than the conveyance. The award itself is not dated. Even, however, if the complainant was a creditor, Mrs. Swan must prevail by virtue of her title acquired at the commissioners' sale under the decree foreclosing the vendor's lien at suit of Pierre Becker & Son, Whitworth's assignees. The execution of the note and deed of trust was a payment in full, and it was proper for Pierre Becker & Son to so receipt to the commissioner. This purchase cannot be assailed for fraud. It was perfectly fair. If Isaac Smith had a subsequent equity in the land and desired to protect it, he should have paid off the prior incumbrance before the sale.

*J. B. Chrisman and R. H. Thompson*, for the appellee.

1. The appellants have a Quaker gun in their fort, which their counsel pretend is a columbiad. It is said that the account furnished the arbitrators by Isaac Smith was fraudulent, and that on a fair accounting between the partners, Swan is the creditor. But the fact is, that the bridge adventure was fully settled by the arbitration, and years afterwards, when Isaac Smith has surrendered his vouchers, he cannot be compelled to account again. The pretext about a violation of trust and confidence is attenuated. Swan, who by his own showing would not settle with Isaac Smith except by arbitration, is absurdly compared to the sick girl in *Meek v. Perry*, 36 Miss. 190, who made a will in favor of her cunning guardian. Mary S. Swan cannot, in this collateral proceeding, go

into a reinvestigation of the partnership affairs, which have been settled by the award, the due bill and the subsequent judgment thereon. She was not a partner, and has no concern with those matters.

2. The proof of the fraudulent character of the conveyances is clear. James F. Smith was a man of straw, who paid nothing for his half interest, and to whom the deed was made by Whitworth, merely to conceal the fraud. Swan bought and paid for the property, and the series of conveyances was merely a scheme to vest the title in his wife in such manner as to avoid his debts. Such was the Chancellor's view of the evidence, and under the well settled rules of this court, unless there is some legal objection, his determination on the facts will not be disturbed. It is urged that the payment of the Erwin judgment does not make Isaac Smith a judgment creditor of Swan, and that the Watson claim was not paid until after the bill was filed. Since the decisions in *Clopton v. Gholson*, 53 Miss. 466, and *Thomson v. Hester*, 55 Miss. 656, these points require no refutation. This is a stronger case than either of those. The arbitration, the acceptance of the award by Swan, and its execution by the complainant as far as he was required, make the latter a prior creditor within the statute, while his payment of the judgments subrogates him to the judgment creditors' rights.

CHALMERS, J., delivered the opinion of the court.

Isaac Smith and James T. Swan, who had been partners in the building of a public bridge for the county of Lincoln, submitted to arbitrators the settlement of their partnership accounts. By the award it was determined that Swan should pay the debts due by the firm to one Erwin and to one Watson, and should also pay to his partner Smith the sum of one hundred and twenty-eight dollars, for which sum he executed his due bill. Smith was to pay all other firm debts. This award was accepted by both parties as satisfactory. Smith paid all the firm debts, the payment of which was allotted to him, but Swan paid neither the debts due to Erwin and to Watson, nor the due bill executed to his partner. Smith brought suit upon the due bill, recovered judgment, and

had return of *nulla bona*. Watson and Erwin brought suits against both Smith and Swan on the firm debts held by them and recovered judgments. Smith paid Erwin's judgment, and arranged to pay Watson's before filing this bill, the object of which is to vacate an alleged fraudulent conveyance of property on the part of Swan to his wife. It is objected by demurrer that the bill cannot be maintained, because it is not shown that the complainant was an existing creditor at the date of the alleged fraudulent conveyance. The point is not well taken. The rights and obligations of the parties must be considered as originating with the award which took place in February, 1873, whereas the conveyances complained of were made in August following.

It is further objected that the complainant cannot maintain any claim to relief based on his payment of the Erwin judgment or his arrangement to pay the Watson judgment, because as to neither of these is he a judgment creditor of Swan. The argument is that inasmuch as none but judgment creditors can maintain bills to vacate fraudulent conveyances, the complainant, before filing the bill, should have brought suit against his former partner, upon his assumption to pay these claims, and should himself have recovered a judgment at law against him, on account of his failure to meet his obligation. There is no difficulty in maintaining the bill so far as the Erwin judgment, which the complainant has paid, is concerned. From the date of the arbitration, and by virtue thereof, the relation of principal and surety existed between the partners as to the firm debts, which each thereby obligated himself to pay in exoneration of the other. As to the Erwin and Watson debts, Swan became primarily and Smith secondarily liable *inter sese*. While the creditors were in no manner bound by the arrangement, and a court of law could take no notice of it, a court of chancery will respect and enforce it, and will regard Smith, in paying off these judgments, in the light of a surety who has discharged a burden resting primarily on his principal. It is well settled in such cases that the surety will in a court of chancery be subrogated to all the liens, rights and privileges of the holders of the debt discharged. Our statute, Code 1871, § 2258, giving to sureties and indorsers who have paid

judgments against themselves and others primarily bound, the right to executions in their own names against such others, is but the statutory adoption in courts of law of a well-settled equitable principle. While the statute limits it to those who are legally sureties or indorsers, courts of equity apply it whenever the circumstances of the case establish the practical relation. 1 Story Eq. Jur. §§ 493-502; *Conway v. Strong*, 24 Miss. 665; *Woods v. Ridley*, 27 Miss. 119; *Short v. Porter*, 44 Miss. 583.

With regard to the *Watson* judgment, the bill alleges that the complainant had made arrangements for paying, and expected shortly to pay it. It was paid before the hearing. If the bill had been filed upon that judgment only, it could not be maintained notwithstanding the subsequent payment; but as it is part of a common transaction, as the jurisdiction is given by the other demands, and as the court has the fund and all the parties before it, we shall not remit the complainant to a new suit, but upon the same principle that authorizes the embodiment in a decree of the full amount due on a series of notes, some of which have fallen due since the filing of the bill, we permit a recovery upon it in deference to the doctrine that equity will, when possible, prevent a multiplicity of suits.

Upon the merits we concur with the Chancellor in thinking the conveyances to Swan's wife fraudulent. He properly disregarded Swan's claim that he had been defrauded in the arbitration. According to his own statement, he knew of the alleged frauds before the rendition of judgment on the due bill, and yet made no defence to it, and gives no reason for not having done so. The Chancellor erred, however, in failing to protect the interests of *Pierre Becker & Son*. They had paid off valid incumbrances upon the property, and were entitled to be reimbursed. The decree will be reversed, and cause remanded with instructions to have an account stated of the amount due them, and then for a decree of sale, with directions to the commissioner to pay that amount out of the proceeds, and apply the balance to the complainant's decree; the costs in this court to be divided, and those in the court below to be paid by Swan and his wife.

*Decree accordingly.*



## THOMAS R. CALDWELL, ADMR., ET AL. v. LAFAYETTE WILLIS.

57 555  
684 6861. **BEQUEST.** *Limitation. Perpetuity.*

A bequest to a man "during his life, and at his death to his child or children then living and the descendants of such child or children and their heirs for ever," makes him absolute owner, so that he can dispose of the entire interest to the exclusion of the limitees.

2. **SAME.** *Void limitation. Interest of first donee.*

If void limitations are engrafted upon a bequest manifesting an intention to dispose of the entire interest in the personalty, it vests absolutely in the first legatee.

3. **SAME.** *Remainder after life-interest. Perpetuity.*

The limitation, after the life-interest, to the legatee's "child or children then living, and the descendants of such child or children and their heirs for ever," is void because it violates the rule against perpetuities.

4. **SAME.** *Limitation to a class. Void as to individual.*

If the limitation is void as to any of the persons in the class to which it is made, it is void as to the whole class.

5. **SAME.** *Contingent legacy. Rule against perpetuity.*

A limitation by way of executory bequest is void, if the absolute interest may not vest within a life or lives in being at the testator's death, and twenty-one years and ten months thereafter.

6. **SAME.** *Conditional limitation. "Dying without children."*

The Act of 1822, § 26 (Hutch. Code 610), applies only to limitations contingent on a person dying without children or descendants, and does not add the words "then living" to a limitation to the descendants of the donee of a life-interest.

7. **SAME.** *Construction of will. Supplying words.*

If the testator's intent, manifested by the entire will, carefully prepared by a skilful conveyancer, was to omit the words "then living," they will not be supplied by the court, in order to sustain the limitation.

8. **SAME.** *Rejecting words.*

While a word may be rejected, if the other parts of the will show that it was improperly and incautiously used, it will not be discarded on a mere conjecture, based on a presumption that the testator intended a provision similar to the Statute of Distributions.

9. **SAME.** *Land to be sold for legacies. Personalty.*

If land is directed to be sold, and legacies paid with the proceeds, it will be treated by a court of equity, in construing the will, as personal property, even before the sale.

APPEAL from the Chancery Court of Monroe County.

Hon. L. HAUGHTON, Chancellor.

*Murphy, Sykes & Bristow*, for the appellants.

1. As children of Daniel Willis, living at his death, the appellants are entitled, under the will, as remainder-men, to his half of the proceeds of the residuum ; and, if Lafayette Willis dies without children or descendants, they, as representatives of Daniel Willis, the surviving contingent remainder-man, will be entitled to two thirds of Lafayette Willis's share. It is objected that the effect of the will is to create an estate-tail, or a perpetuity, and that by our statute it became an estate in fee-simple. This is the controversy. If the language of the will can be reasonably construed, so as to mean a limitation, which is legal, the court will adopt that construction *ut res magis valeat quam pereat*. The limitation is an estate to Daniel Willis for life, remainder in fee-simple at his death to his child or children or their descendants then living, or, if the widow has a life-estate, a remainder to Daniel Willis for life, remainder to his child or children or their descendants, living at his death, in fee-simple. Considering the property devised as real estate, either of the limitations is good, both under the statute and at common law, and considering it as personal property, both are good at common law, and there is no restriction on them under the statute. The statute (Hutch. Code, pp. 609, 610, §§ 24, 27) allows, as an exception to the clause abolishing estates-tail, an estate in lands to be limited to any number of donees living and the heirs, or the heirs of the body of the remainder-man, and, in default thereof, to the right heirs of the donor in fee-simple, and further provides that an estate may be limited, by way of remainder, to an unborn child, who may take, even if born after the father's death, contrary to the decision in Shelley's case that a child *en ventre sa mere* cannot take an estate by way of purchase, so as to oust the heir *in esse*. The limitation in the case at bar does not go as far as the statute allows, and would be good thereunder. But as no estate-tail is attempted to be created by the will, to come under either the prohibition or the sanction of the proviso, the statute does not apply, and we are left to the common law on the subject of perpetuities. The common-law rule is that an estate may

be limited to a life or lives in being and twenty-one years and the period of gestation afterwards. *Jordan v. Roach*, 32 Miss. 481, 611; 2 Bouvier's Law Dic., title "Perpetuity"; 2 Redf. on Wills, 568; 1 Fearne on Remainders, 471. By the will under consideration, the condition must be fulfilled at the moment of Daniel Willis's death, since the children living at his death took the instant he died, and the contingency of dying "without children" means by the statute (Hutch. Code p. 610, § 26) dying without children "living at the time of his death." All the candles were burning at the testator's death. He might have postponed the vesting of the remainder for twenty-one years and ten months after the last candle went out, but he has not done so. The moment the last candle is extinguished, the remainder in fee is bound in the nature of things to vest. 2 Redf. on Wills, 572, § 17. If, however, the bequest of the proceeds of sale of the residuum is personalty, which we think is the case, the statute of 1822 (Hutch. Code, p. 609, § 24), before cited, which is construed in *Carroll v. Renich*, 7 S. & M. 798, and *Kirby v. Calhoun*, 8 S. & M. 462, even if it prohibited limitations like those under consideration (which it does not, as we have seen), does not apply, for its provisions are confined to lands and slaves. There being then no prohibition against limitations of personal property in the statute, we are again left to the common-law rule. The doctrine that personal property may be limited over, by way of remainder, after a life-estate created at the same time, is now fully recognized and settled, both in England and the United States. Schouler on Personal Property, 166-168; 2 Kent Com. 352, 353; 1 Fearne on Remainders, 406, 471, 482, 483, 553; *Smith v. Bell*, 6 Peters, 68; *Westcott v. Cady*, 5 Johns. Ch. 384; *Logan v. Ladson*, 1 Desauss. 271; *Geiger v. Brown*, 4 M'Cord, 427; *Hubbard v. Selsler*, 44 Miss. 705; *Gray v. Bridgeforth*, 33 Miss. 312; *Moffatt v. Strong*, 10 Johns. 12; *Langworthy v. Chadwick*, 13 Conn. 42; *Hudson v. Wadsworth*, 8 Conn. 348. The case last cited was a case of contingent remainder in money. The rule of perpetuities applies to personal property, which may be limited, by way of remainder, to the extent of any number of lives in being and twenty one years and ten months after. Schouler on Personal Property, 173; 1 Fearne on Remainders,

471; *Sheffield v. Lord Orrery*, 3 Atk. 282. The only exception to the foregoing rule is in the case of such chattels as wine, hay, corn and provisions, *quæ usu ipso consumuntur*. But this exception does not include money, — not even farming stock or wearing apparel. If, then, the construction of the testator's intention, as gathered from the will, is correct, the devise for life, with the remainder over, is good, and the appellants are entitled to a decree.

2. But the opposing counsel insist that the construction is not correct, and, in construing the will themselves, assume the position that the sentence — “To the said Daniel Willis during his life, and at his death to his child or children then living and the descendants of such child or children and their heirs for ever” — means a limitation (1), to Daniel Willis for his life; (2), to his children for their lives; and (3), to their descendants in fee. This, we admit, would be void as too remote. But that construction is forced, unnatural and contrary to the testator's language. “Child” or “children” and “descendants” mean the same remainder, which vests in possession at the same time, *i.e.*, at the death of Daniel Willis. It is the provision, usual in such bequests, that, in case a child should have died before Daniel Willis's death, such descendant should take as remainder-man its deceased parent's share of the legacy. The will shows the testator's intention to provide for the support and education of his children, and to start them fairly in life on their marriage or majority, and a distrust of their energy or capacity, with the purpose to guard his grandchildren against the improvidence of their parents. No absolute estate is devised to the children in the whole will, but it is always for life, and at their death to their child or children then living. The words “child or children,” in the clause giving the remainder, might, if unqualified, be construed to exclude the grandchildren, and so the testator wisely put it beyond doubt, by using the language, “and at his death to his child or children then living, and the descendants of such child or children.” The remainder in fee vests in the descendants and the children at Daniel Willis's death. Wherever a life-estate is devised, the will is superfluously accurate, and the change of phraseology here mani-

feasts the design to give a different estate. The word "such," which was used inadvertently, is the only doubtful word in the clause. But if that means the descendants of the "child or children then living" at Daniel Willis's death, which we do not admit, the limitation is still good. "Descendants" does not, like "heirs," presuppose the death of the ancestor. The copulative conjunction in the limitation of the estate to vest at his death in his "children then living *and* the descendants" shows that they must be all living when the condition of his death is fulfilled. If this is not so, when does the fee-simple vest? The words are, "descendants of such child or children and their heirs for ever." What descendants take the fee, if not those living at his death? The limitation contingent upon Daniel Willis dying without "child or children or the descendants of such child or children," which immediately succeeds the clause under consideration, settles the construction, for it provides that, in such event, the estate shall go to his widow and his brothers and sisters. At common law the words, with the context, would not be construed to mean an indefinite failure of issue (2 Fearn on Remainders, 549), and by the statute (Hutch. Code, p. 610, § 26) the construction for which we contend is fixed. The will is carefully and accurately drawn, so that every sentence has its meaning and every contingency is considered and provided for. The intention of the testator, as gathered from its language, which is the pole-star of construction, is manifestly (1) that the widow should be comfortably supported during her life; (2) that the estate should be kept together, and the children supported and educated out of it until they came of age or married; (3) that each child, when it became of age or married, was to have a fair advancement made to it, cautiously providing for the children of such child by limiting the gift to the child to a life-estate, with remainder in fee to the children; (4) that if a child died unmarried, during the life and widowhood of the widow, it was then dropped from the calculation; (5) if a child, becoming entitled to a share in the proceeds of sale of the residuum, died before actually receiving it, to prevent a lapse, it was to go to the brothers and sisters named. Such,

we submit, is the fairly expressed intention of the testator. The sequel of this litigation may show that the testator, though exercising what might have been then considered extraordinary caution, "builted wiser than he knew," and that his thoughtfulness has saved his grandchildren from penury.

*E. H. Bristow*, on the same side, made an oral argument.

*Reuben Davis*, for the appellee, argued orally and in writing.

The devise to Daniel Willis during his life, and, at his death, to his child or children then living and the descendants of such child or children and their heirs, vests in the first taker a fee-simple estate, and the rest of the clause is void. But if it creates an estate tail, or conditional fee, the first taker has a fee-simple, by virtue of the statute. It is not good as an executory devise. The estate really created, however, is a conditional fee, or an estate-tail, which is an inheritance restricted to lineal heirs. The words "dying without issue or children," coupled with a limitation over on that event, have always been held to create an estate-tail in the first donee. 1 Greenl. Cruise, 81; 8 Greenl. Cruise, 250; *Jordan v. Roach*, 32 Miss. 481. Where the limitation over is to collateral heirs, as in this case, the intention is regarded as so manifest as to exclude all doubt. 2 Preston on Estates, 504; 3 Greenl. Cruise, 256; *Nottingham v. Jennings*, 1 Ld. Raym. 568; 1 Fearne on Remainders, 166; 1 Jarman on Wills, 237. The reason is, that, although the word "heirs" is used, the subsequent language shows that "heirs of the body" were meant. In *Hampton v. Rather*, 30 Miss. 193, it was held that the terms of the instrument in that case would have created an estate in fee-tail in real estate, and consequently that it conveyed the whole interest in personal property. The result is accomplished by the united action of the statute and the rule in Shelley's case. That rule has not been repealed, but is applied in aid of the object contemplated by the statute. If not good as an estate-tail, the limitation is void for perpetuity. It is equally in accordance with the common law and the statute that the result of an attempt to tie up property, real or personal, in this manner, is to vest the whole interest in the first donee. The law looks to depriving the owner of control of his property within a limited time after his death. While in the cases of *Carroll v. Renich*, 7 S. & M. 798; *Kirby v.*

*Calhoun*, 8 S. & M. 462; *Rucker v. Lambdin*, 12 S. & M. 230, executory devises of both real and personal property are recognized as valid, it has not been held that they could exceed the limits prescribed in the proviso to sect. 24 of the Act of 1822. It is urged that the conditional limitation which follows the devise to the children and their descendants and the heirs of the latter, giving the property to the brothers and sisters of Daniel Willis, brings the entire bequest within the statute. The position is fallacious. A life-estate being devised, with a limitation over to the heirs of the donee's body, under the rule in *Shelley's case*, the estate of the first taker was converted into a fee-tail. This, by the statute, became a fee-simple estate; and the conditional limitation was inoperative. Or, if the limitation to the child or children of Daniel Willis living at his death and their descendants and their heirs for ever, is void, Daniel Willis took an estate in fee-simple, and the result is the same. In either case, the appellants have no interest in the property, but the appellee is owner by virtue of the conveyance from Daniel Willis.

*Baxter McFarland*, on the same side.

1. The bequest is of the proceeds of the land which has not been sold. But, under the will and the circumstances, the land will doubtless be treated as personalty, and the rights of the parties determined as if the contest was actually over the proceeds. Story Eq. Jur. §§ 790 *et seq.*, 1212 *et seq.*; 1 Jarman on Wills, ch. xx. For fear, however, that the court may think otherwise, some observations will be offered from both points of view. The act of 1822 (Hutch. Code, p. 609, § 24) converts estates in fee-tail, thereafter created in land, or slaves, into estates in fee-simple, allowing, however, a conveyance or devise of lands to a succession of donees then living and the heir or heirs of the body of the remainder-man, and in default thereof, to the right heirs of the donor in fee-simple. The author of this will was evidently skilled and learned, and able in apt words to say what he meant, and he must therefore be taken to have meant what he said. It is not a will in which the court can look beyond the language to ascertain the intention. There is no obscurity. The "pole-star" is clear.

And the inherent force of the language will not be modified by construction. The precise words used are these: "and at his death to his child or children then living and the descendants of *such* child or children and their heirs for ever." Under the rule established in Hutch. Code, p. 610, § 26, the language can receive but one construction. The words "then living" were intended to qualify "child or children," and not "the descendants of such." The statute provides that, where there are no such express words, they shall be implied, unless the intention be otherwise plainly declared. The common-law rule was the reverse. In this case, the statutory rule cannot apply. The author of the will so accurately arranged the language, and placed the qualifying phrase, as to exclude the operation of the statute. Under the principle *expressio unius exclusio alterius*, it must be held that the application of the words "then living" to the words "child or children" excludes the right to supply them by intendment after "descendants."

2. The time within which the absolute estate in personality shall vest is a life or lives in being, twenty-one years and the period of gestation. It is not sufficient that it may vest in that time. If it may not, the effect is the same as if it obviously cannot, and equally falls under the condemnation of the rule. 2 Bouvier's Law Dic., title "Perpetuity." If the limitation extends, or may extend, beyond the prescribed period, it is void. If the clause in question is construed according to the natural and grammatical meaning imported by the language, *i. e.*, that the devise is to such child or children of the respective donees as may be living at their death and to the descendants of those living children and their heirs for ever, to the exclusion of a child or children of said donees, who had died previous to the decease of the donee; then, under the principle against perpetuities, above referred to, the limitation is too remote, and is void. It penetrates the line of posterity indefinitely. "Descendants," as used, does not mean descendants of predeceased children, on the one hand, nor the living descendants of the "child or children" alive at the death of the donee, on the other, as contended by the counsel for the appellants. In other words, it does not mean



the descendants, whether of dead or living children, living at a single point of time, but denotes a class of persons to take from generation to generation. It has also the effect, as in *Jordan v. Roach*, 32 Miss. 481, of restricting the general words, "their heirs for ever," so as to mean the "issue," "lineal descendants," or "heirs of the body" of the "child or children," to whom the limitation first applies, viz., those living at the death of the donee. The word "heirs," as used in this sentence, is not descriptive of the estate devised to the "child or children then living" and the "descendants," — whether of the living or dead children, — but of the persons intended to take, and the phrase, "their heirs for ever," taken with the other words, denotes such heirs only as are "descendants" of the "child or children" referred to in the preceding part of the limitation. Forty years have worked many changes in ideas concerning property, and we must go back that far, and farther, in order to look at things from the standpoint of this testator, whose testamentary disposition indicates that he grew up in England or South Carolina, where entailments and preferences were quite common, even when indulging in them resulted in excluding grandchildren. The force of the old-time desire for self-perpetuation, manifested in and nourished by the wide-spread custom of sending property down the line of future generations, allowable almost everywhere until a recent period, was felt much more strongly here a half-century ago by the emigrants of that day than by the present generation, and it is curious to observe how little influence was oftentimes exerted upon testamentary dispositions of property by considerations of kinship. Pride, desire of self-commemoration, and kindred sentiments, rather than the natural affections, largely controlled such testaments, and are important factors when we depart from the language used in a will made in those days to seek the intention of the testator.

3. But suppose that the will is construed to refer to such child or children and descendants of dead children as were alive at the donee's death, all being regarded as constituting a class of remainder-men, to take jointly at that time, still consequences result very different from those contended for by counsel. That would bring the case within the prin-

ciple of the rule in Shelley's case, and Lafayette and Daniel Willis would take absolutely. By the conveyance of Daniel Willis, Lafayette would acquire the entire property absolutely. In brief, the rule in Shelley's case is stated to be, in any instrument, if a freehold is limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to his heirs he takes a fee-simple, if to the heirs of his body, he takes a fee-tail. 2 Bouvier's Law Dic., title "Shelley's Case"; 4 Kent Com. 274 *et seq.* The rule prevails in this State as to personal property. *Powell v. Brandon*, 24 Miss. 343; *Hampton v. Rather*, 30 Miss. 193. By that construction all are embraced who would be included by the words "heirs of the body," or "issue" of the donee, and having the same effect, the same rule of law will be applied. It includes all who could entitle themselves as heirs of his body at his death, viz., all his living children and all the representatives of dead children,—all, therefore, who descended from the loins of the donee. The effect is as broad as that of the words "heirs of the body," or "issue," and converts the estate into a fee in the ancestor, there being as much reason for a conjunction of the life-estate and the fee here as in any other case. 4 Kent Com. 226, 227; *Stephenson v. Hagan*, 15 B. Mon. 282; *M'Nair v. Hawkins*, 4 Bibb, 390. It is submitted that one of two things was intended, *i. e.*, either that (1) Daniel Willis should take a life-estate, and (2), at his death, his children then living a life-estate, and (3) their descendants a fee-simple or fee-tail; or that the property was given to the child or children then living and their lineal descendants indefinitely. Either intent would destroy the asserted claims of the appellants.

*Murphy, Sykes & Bristow*, for the appellants, in reply.

If this will was drawn by a skilful and intelligent conveyancer, as opposing counsel insist and we contend, he would not have incorporated in it an illegal provision; and we submit that he has not. Counsel contend that the intention of the limitation is expressly and plainly declared on the face of the will to refer to an indefinite failure of issue, but we fail to perceive such express declaration. Hutch. Code, p. 610, § 26,

plainly applies ; and even at common law it would not be so construed. 2 *Fearne on Remainders*, 549. As to the rule in Shelley's case, the word "descendants" is not a word of limitation, unless the intention is clear beyond doubt, to use it in that sense. 3 *Greenl. Cruise*, 216 ; 2 *Wash. Real Prop.* 560. Here it cannot mean "heirs of the body," because the words of inheritance are placed immediately after it. There is no such thing as the "heir" of the "heir of the body." The will shows that "descendants" is a word of purchase, and not of limitation ; in other words, that the "descendants" take as remainder-men. Without following the fanciful argument of opposing counsel, as to the testator's motives, it is enough that, entertaining the intentions which we have noticed in our former brief, he wisely and carefully provided for their being carried out.

GEORGE, C. J., delivered the opinion of the court.

On the 17th day of December, 1841, Augustine Willis made and published his last will and testament, and, dying in a few days thereafter, it was duly admitted to probate in January, 1842. In the second clause of his will he gave his wife a life-estate in all his property, charged, however, with the support and education of his four minor and unmarried children. By the third, fourth, fifth, and sixth clauses, he provided for advancements to be made to his said four minor children, as they respectively arrived at majority or married. Each one of these clauses contained the provision for one child, so that they were all in exactly the same words, except the name of the child for which that clause made provision. The ninth clause was residuary, and directed that upon the death or marriage of the widow his land should be sold, and the proceeds, with the other personalty should be divided among his then surviving children on the same conditions and limitations provided in the third, fourth, fifth, and sixth clauses. These limitations and conditions will be shown by the following quotation from the fifth clause, which made the provision for an advancement to his son Daniel ; viz., after providing for an advance of twenty-five hundred dollars, the will provides, "and I hereby devise the money or property to

be thus divided: to the said Daniel Willis during his life, and at his death to his child or children then living and the descendants of such child or children and their heirs for ever." This clause then proceeded to make a limitation over of the share of Daniel, in case he died without child or children, or the descendants of such. The ulterior limitees were the three remaining of the four minor children; viz., Sallie, Ada, and the appellee, Lafayette. The names of these limitees were changed in the other clauses before mentioned, so that whenever one of the four died without issue the other three were to take the remainder. A son, Augustine, was allowed also to take in remainder, under certain additional conditions, not necessary here to mention. The testator named in other parts of the will three other children, as having been fully provided for, and he directed that they should receive nothing from his estate. Augustine died in 1842, Ada in 1844, and Sallie in 1850, both of these last unmarried and minors. The widow of the testator died in December, 1865, without having married a second time. At her death Daniel and Lafayette alone survived of the beneficiaries in the will. The executors nominated in the will all refused to act, and administration on the estate, with the will annexed, was first granted to the widow and one Dyche, jointly. Dyche resigned, and a new grant of letters was made to the widow alone, who made a final settlement of her accounts in June, 1855. After the death of the widow, in September, 1866, Daniel and Lafayette, regarding themselves as the owners in fee of the lands devised by the will, and directed by it to be sold, made partition of the same, and immediately afterward Daniel, for a valuable consideration, sold and conveyed his share to the said Lafayette in fee-simple. Daniel died in 1867, leaving three children. In July, 1878, one of the appellants, Thomas R. Caldwell, was appointed administrator *de bonis non*, with the will annexed, of Augustine Willis, the testator; and he and the said three children of said Daniel exhibited this bill against Lafayette Willis, in which they seek to recover one half of the two special legacies given to Daniel and Lafayette, and the proceeds of the sale of one half of all the lands of which the testator died seised and possessed, together with the rents and profits of the same

from the death of Daniel in 1867. The bill also claims that the three children of Daniel Willis are entitled to a contingent interest in the other half of the estate, to become vested in them in case Lafayette shall die without issue ; and it is alleged that said Lafayette is fifty-eight years old, and is now without issue, and is likely to die without issue ; and this part of the bill seeks that some security be afforded by the court against the loss or destruction of it by said Lafayette, so that, in case he dies without issue, the share of the complainants, who are children of Daniel, may be forthcoming. The bill asks for a sale of the land, so that the will may be carried out. There was an answer to the bill, and the cause was tried on the bill and answer, and an agreement of the parties to the effect that the court should determine the rights of the parties under the will and decide no other question, leaving the other questions to be settled afterwards. The Chancellor dismissed the bill and the complainants appealed.

Under the view which we have taken, it is unnecessary to do more than decide upon the construction of the will, as to the estate devised in the third, fourth, fifth, and sixth clauses, which make special bequests to the four children therein named. The settlement of this question will also settle the rights of the complainants under the ninth or residuary clause, since the last clause adopts the before-mentioned clauses as to the nature of the estate given under it. We quote again the provision in the will of Augustine Willis, which we are called upon to construe, as follows : " I hereby devise the money and property to be thus divided : to the said Daniel Willis during his life, and at his death to his child or children then living and the descendants of such child or children and their heirs for ever." It is insisted by the appellants, the children of the said Daniel, that he took only a life-estate in the devise, with remainder to them in fee. On the other hand, it is insisted that the life-estate expressly given to Daniel has been enlarged to a fee, either by the operation of the rule in Shelley's case, or because the estate is attempted to be entailed, in violation of the rule against perpetuities. The difficulty about the construction arises from the use of the words " descendants of

such child or children," for it is conceded on both sides, if these words were erased from the will, so that the devise would be to D. for life, and, at his death, to his child or children then living and their heirs for ever, the devise would vest a life-estate in D., with remainder at his death to his children then living. There are but four possible meanings to the clause under consideration, so far as relates to the question as to who shall take after the death of D., and in what character, viz.: 1. That the child or children "then living," and the living descendants of such children, as may be then dead, will take, such descendants to take the share of their deceased parents; 2. That the child or children (at the death of D.) living, and the descendants, then also living, of the living children, take as tenants in common, each descendant taking a full share with a living child; 3. That the child or children of D., living at his death, and their descendants, will take, the descendants to take in succession to the children, and on the death of their respective parents. And, under this meaning, the descendants would take either as purchasers after the death of their parents, or as heirs of their said ancestor; 4. That the child or children living at D.'s death, and their descendants generally and indefinitely, are to take as tenants in common. The appellants insist that the first meaning is the true one, and that, if they should be mistaken in that, then, at all events, the second meaning must be adopted.

There is nothing in the language of the will to authorize the adoption of the first possible meaning. The language is "to the child or children then living and the descendants of *such* child or children." The import of this is plain and clear, and there is no room for construction. The descendants referred to are the descendants of the children mentioned in the prior clause of the sentence, viz., children then living, *i.e.*, living at the death of D. The words "such child or children" plainly connect the last named children with the first. It is admitted that this is the grammatical meaning of the words, but it is insisted that this meaning arises from the improper and incautious use of the word "such." If there was any thing in the other parts of the will to show that the testator had a different intent from that expressed in this clause, we

might reject this or any other word which was inconsistent with the plain meaning of the testator, as thus shown from a consideration of the whole will. But we find no such different intent expressed. If we reject the word "such," we have no other ground for it than a conjecture based on a presumption that the testator intended to make a provision similar to the statute relating to the distribution of intestates' estates. It is clear, therefore, that the first possible meaning which might be attributed to the clause in question cannot be adopted. The second meaning will be discussed hereafter in connection with the fourth.

We proceed now to consider the third supposed meaning ; viz., that the descendants take in succession "to the children then living," and either as their heirs or as purchasers. Suppose it is asserted that they take as "heirs," then the word "descendants" is wholly without force in the clause, since the word "heirs" is also used and expresses the exact idea which this supposition attaches to the word "descendants." This would be to obliterate this word entirely from the will, which we have seen cannot be done, unless a plain intent to do so appears from other parts of the will ; and no such intent appears here. Take, then, the alternative meaning, possible under this supposition ; viz., that the "descendants" take as purchasers ; then the will must be construed as if it read thus : to D. for his life, and, at his death, to his children then (*i.e.*, at D.'s death) living, for their lives, and then to their descendants and their heirs forever. It is manifest that this construction, if adopted, would destroy the title set up by the complainants. The devise would be void, because it would be in violation of the rule against perpetuities, which requires the fee to vest within a life or lives in being at the testator's death, and twenty-one years after the expiration of such life, or twenty-one years after the expiration of the last surviving life if more than one be named in the will. The life of a child of D. must necessarily have been in being at D.'s death, for, if the child were then *en ventre sa mere*, it would, for all the purposes of this rule, be considered as in being at the time of the father's death. It is true that the descendants of the child of D. might all of them also be in existence at D.'s death, but it

is equally true that all or some of them might come into being afterwards ; and in such case there would be added to a life in being, at the testator's death, another life commencing after his death, and whenever this is the case the rule against perpetuities is violated, and the limitation void. But we do not consider this the true construction of the will, because there is nothing in the will to show that the children of D. shall take only a life-estate, and nothing to show that the descendants shall take no interest during the lives of their ancestors, the children of D., but only in succession to them.

It has now been shown that neither the first nor third of the supposed possible meanings of the devise can be adopted ; it remains, therefore, to inquire which of the two remaining senses is the true one. The difference between these two meanings is, that, in the second, the devise is construed to be at the death of D. to his child or children then living, and to the descendants of such children, also living, at the time of D.'s death ; and in the fourth it is supposed that, not only "descendants" living at D.'s death are included in the devise, but also his descendants generally, whether living at the time of D.'s death or coming into being afterwards. The "descendant," who seeks to make out his claim under this clause, must be a descendant of a child living at D.'s death. There is no ambiguity or indefiniteness as to the party from whom the descendant is to issue, — the ancestor must be a child of D., living at D.'s death. Both sides concede this. The point at which the controversy arises is whether all of these descendants, or a part, are to take under the will, and, if a part only, then, which part ? There is nothing in the will to suggest, nor does the argument suggest, a division of these descendants into classes, a part of whom shall take, and a part not, unless it be as to the time of the existence of the descendants, with reference to D.'s death. Divided with reference to this point of time, there can be but three possible classes of descendants, viz: 1. Those who died before D ; 2. Those *in esse* at the time of D.'s death ; 3. Those coming into being after D.'s death. There can be no other possible descendant of a child of D. It is manifestly impossible that the first class should have been intended, for they could not have taken ;



they had ceased to exist when the devise was to take effect; and, besides, there is nothing in the will to indicate that provision was made for deceased descendants of children when there was none made for deceased children or their living issue.

As to the second class, viz., those descendants of a surviving child of D., who were *in esse* at the time of D.'s death, and none others, it is insisted, in support of the view that this class was meant, that the words "then living" should be read as if inserted after "descendants" in the clause under consideration. The will, under this construction, would read as if written thus: to D. "during his life, and at his death to his child or children then living and the descendants then living of such child or children and their heirs for ever." As written, the devise is: to D. "during his life, and at his death to his child or children *then living* and the descendants of such child or children and their heirs for ever." The testator expressly describes the children of D. who are to take at D.'s death, as those "then living," but omits to qualify the "descendants of such child or children" in the same way. Have we a right to say that the testator meant nothing by this change in phraseology, and to insert in his will words which, after being used to qualify the immediate descendants of D., his children, are omitted, as a qualification of his more remote descendants? We think not. The will bears internal evidence of having been prepared with care, under professional advice. The phrase we have quoted appears *ipsissimis verbis* four times in the will. It does not therefore owe its peculiar structure to haste or inadvertence. On four several occasions he qualifies the children of D. by the words "then living," and in the same sentences, and in immediate juxtaposition, with such use of these words as applied to children, he omits them in connection with descendants. We are bound, therefore, to hold that the appropriate and unambiguous language, thus deliberately adopted and repeated, expresses the meaning and intent of the testator. He must be held to have meant what he has thus plainly and deliberately expressed.

But it is argued that the 26th section of the Act of 1822, Hutch. Code, p. 610, applies to this clause of the will, and has

the effect to insert "then living" after the word "descendants." This section, so far as it relates to this question, is as follows: "Every contingent limitation in any . . . will, made to depend upon the dying of any person without . . . children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person shall die, not having such . . . child, or offspring, or descendant, or other relative (as the case may be), living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise expressly and as plainly declared on the face of the . . . will creating it." We think that, if the statute applies, the position of the appellee, that the contrary intention mentioned in it is plainly and expressly declared on the face of the will, is well founded. For it is impossible to conceive that the testator intended, for the reasons before given, that the words "then living" should be read after "descendants." And if the testator did not intend the words to be inserted, it must be held that he meant to have his language construed without the qualification implied in them. But we do not think that the statute applies to the clause under consideration. It applies only to contingent limitations made to depend upon a person dying *without* children or descendants, &c. The clause in question contains no limitation on the death of a person dying without children or descendants. On the contrary, the clause proceeds on the idea that there will be children or descendants of D., and makes a disposition of the estate to such children and descendants; and the question here is, not as to the validity of a limitation over to other persons, dependent upon the death of D. without children or descendants, but it relates solely to the validity of the limitation to these children and descendants of D., supposing them to have been born and not to have died. It thus appears that the second class of descendants, viz., those only living at the death of D., was not meant by the testator.

We think it equally evident that the third class, or those only who were born after D.'s death, was not meant as the only descendants entitled to take. If they alone were meant by the testator, then existing issue would be excluded,

when no intent to exclude them, as a *part* of the descendants, is manifested in the will. This construction would make the testator draw a distinction in the distribution of his bounty against actual descendants in favor of future possible descendants, both classes being related to him and his child D. in the same degree. Such a construction will not be adopted unless there be plain words requiring it, and there are none such here; on the contrary, there is a strong implication against it.

It being thus shown that the three possible classes of descendants of the children of D. taken separately were not intended, we must construct a fourth class, composed of some or all the three classes before mentioned. For the manifest reasons above stated, in rejecting the first class, as those alone meant in the will, we exclude it from this fourth class. The first class being eliminated, we have this fourth class composed jointly of those who were comprised in the second and third classes, viz., the descendants of the children of D. living at his death, and also those who might come into being afterwards. This class being the only possible class, not already ascertained to be not included in the bequest, and being also fairly embraced in the language of the will, must be adopted as comprising those descendants who were intended by the testator to take after D.'s death. And this being the class of "descendants" intended, then, also, it is established that the fourth possible meaning of the whole clause of the will under consideration is the true and correct construction of that instrument. Restating that meaning, we find that the devise is to D. during his life, and, at his death, to his child or children then living and the descendants of such child or children, generally and indefinitely, as tenants in common.

Is such a bequest good? is the next question. Except when the limitation is by way of contingent remainder, which may be cut off by the alienation of the particular tenant (which liability to be defeated in this way is the reason for the exception), a limitation of an estate in realty or personalty will be void, if by the terms of the instrument creating it the fee may not vest within a life or lives in being at the death of the testator, and twenty-one years and the usual period of gestation

thereafter. This rule applies as well to executory devises, when an estate in fee is given, and a limitation over, devised to another upon the happening of some contingency which will have the effect to cut short the estate devised to the first taker, and at the same time to vest it in an ulterior limitée; as also to provisions like the present, where an attempt is made to tie up the inheritance or absolute interest in a direct bequest, and for a longer period than allowed by the above-mentioned rule. It is manifest that the devise or bequest in question, so far as it relates to the descendants of the child or children of Daniel Willis, who were not, or might not be, born at the death of said Daniel, or within ten months (the usual period of gestation) thereafter, is void; for, if such descendant could take under the will, his interest would not vest within the period prescribed by the rule, for we have the life of Daniel, which was in being when testator died, and also an indefinite period thereafter, in which the fee is to vest. The limitation being to the descendants of the children of D. indefinitely, it might happen that a person answering the description of such descendant, and therefore entitled to take under the terms of the will, might not come into being until after the period fixed by the rule above stated. For it must be borne in mind that, by the terms of the rule, the bequest will be void, if by the intent of the will the absolute estate may not vest within the prescribed limits, although as the events actually turn out, every person, who is entitled to take, comes into being within the time fixed by the rule.

It thus appearing that the limitation is void as to some of the persons comprised in the class to which it is made, it results, by a well-settled rule, that it is void as to the whole class. The courts will not undertake to separate the interests of those who might take from those who cannot, for the manifest reason that no such attempt could be successful until the period should come when it would be certainly known that no other person could come into existence who would be entitled to take under the will. Until that time, it could not be known into how many shares the bequest should be divided, and, as a consequence, till then those entitled to take, if they had not been comprised in a class with the

others, could take no vested interest. On this subject Sir William Grant in *Leake v. Robinson*, 2 Meriv. 868, 890, said: "The bequests in question are not made to individuals, but to classes, and what I have to determine is whether the class can take. I must make a new will for the testator, if I split into portions his general bequest to the class, and say that, because the rule of law forbids his intention from operating in favor of the whole class, I will make his bequests what he never intended them to be; viz., a series of particular legacies to particular individuals, or, what he had as little in his contemplation, distinct bequests in each instance to different classes, namely, to grandchildren living at his death, and to grandchildren born after his death." See 1 Jarman on Wills (3d Am. ed.), ch. ix. § ii.

The limitation being void, because it violates the rule against perpetuities, as to personalty then (and both sides concede that the direction to sell the land makes it personalty), the rule is that the first taker gets an absolute estate. In *Harris v. McLaran*, 30 Miss. 533, 570, Smith, C. J., said the estate of the first taker was absolute "in those cases in which an intention to dispose of the whole interest is apparent, and where also conditional limitations were engrafted upon interests in the first takers, which, in the absence of such conditional limitations, would be held to be absolute interests." The rule is laid down in the same way in 1 Fearn on Remainders, 488. The intent to dispose of the whole interest is perfectly manifest in this case. It thus appears that Daniel took an absolute interest in the property given in the will, and, being absolute owner, he had a right to dispose of it to his brother, the appellee. The bill was therefore properly dismissed, and the decree is

*Affirmed.*

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J. H. GREER v. A. H. BUSH ET AL.

1. ACCOMMODATION INDORSER. *Future advances. Assignment.*

An accommodation indorser to order of a promissory note payable to his order given to a commercial firm for supplies to be furnished the

57	575
82	577
57	575
190	212

maker is liable for advances so made by a new firm created by the death of one partner and the admission of another, to which the assets and business of the original partnership are transferred: *aliter*, in case of an unassignable contract, such as a personal letter of credit.

2. SAME. *Balance due. Advances after maturity.*

Although the payments exceed the face of the note, the indorser, such being the contract, is liable for the balance due at the maturity of the note, but not for advances subsequently made.

8. SAME. *Payment. Delivery of mortgaged property.*

Cotton embraced in a mortgage executed by the maker to the firm to secure the note, although delivered by the former to the latter, cannot be claimed by the indorser as a payment, if the firm, without knowing that it was the mortgaged cotton, gave the maker its full value.

4. CIRCUIT COURT. *Practice. Variance. Jeofails.*

The objection of variance must be distinctly raised before verdict, in order that the court may determine the propriety of an amendment, and asking an instruction which is too vague to admonish the court or the opposing party is insufficient for the purpose.

ERROR to the Circuit Court of Clay County.

Hon. JAMES M. ARNOLD, Judge.

The declaration in this case alleges that the note sued on was indorsed in Mobile, Alabama, but there was evidence that the indorsement was made in this State. The following charge was asked by the defendant and refused: "If the jury believe from the evidence that J. H. Greer lived at Shuqualak, in Mississippi, and indorsed the note in controversy there, then the contract of Greer is governed by the laws of Mississippi, and not of Alabama, and the jury will find for the defendant."

*L. Brame*, for the plaintiff in error, argued the case orally, and filed a brief.

1. Although the note is a negotiable instrument, it is competent to show that Greer indorsed for accommodation, and is, therefore, a mere surety. *Hardy v. Pilcher*, ante, 18; *Meggett v. Baum*, ante, 22; 1 Parsons on Notes and Bills, 233, notes; 2 Daniel on Neg. Inst. § 1338, notes. The plaintiffs are not *bona fide* holders. The original firm knew of Greer's relation to the paper, and the surviving partners, having notice, carried it into the new firm. 2 Parsons on Notes and Bills, 27. As the note was not taken for a debt, but for amounts to

be advanced not exceeding its face, it was incumbent on the plaintiffs to show what debts were embraced in the security and the amount due thereon. *Maitland v. Citizens' Bank*, 40 Md. 540; *Stoddard v. Kimball*, 4 Cush. 604; *Williams v. Cheney*, 3 Gray, 215; *Roche v. Ladd*, 1 Allen, 436; *Mayo v. Moore*, 28 Ill. 428; *Gillam v. Huber*, 4 G. Greene, 155; *Tarbell v. Surtevant*, 26 Vt. 513; *Grant v. Kidwell*, 30 Mo. 455; *Williams v. Smith*, 2 Hill, 301.

2. The firm with which Greer contracted was dissolved by the death of a partner (Story Part. §§ 343, 347), before much was advanced and the advances by that firm have been paid. A guaranty for advances to be made or credits to be given from time to time by a firm to a third person will not be extended beyond the actual import of its terms, and the guarantor will not be liable for advances made or credit given after any change in the firm, such as the retirement or death of an old partner or the admission of a new one. Story Part. §§ 245, 249; Collyer Part. 448; 2 Parsons on Contracts, 19, 20, notes. The doctrine applies to more formal instruments, such as bonds. In equity, the contract has the same extent and limitation as at law. *Strange v. Lee*, 3 East, 484; *Pemberton v. Oakes*, 4 Russ. 154; *Penoyer v. Watson*, 16 Johns. 100; *Robbins v. Bingham*, 4 Johns. 476; *Weston v. Barton*, 4 Taunt. 673; *Walsh v. Bailie*, 10 Johns. 180; *Barns v. Barrow*, 61 N. Y. 39. If it could be shown that the change in the firm was beneficial to the surety, he would still not be bound. *Bethune v. Dozier*, 10 Ga. 235; *Atlanta Bank v. Douglass*, 51 Ga. 205. The surety's contract is *stricti juris*, he relies on the original members of the firm, and as to advances by a new firm may well say *non in hæc fœdera veni*. The recklessness of the new firm is shown by the large advances to Hibbler after the maturity of the note. Owing to the fact that Greer's indorsement was special to Bush, Yates & Co., the note was not negotiable, and the rule in favor of a *bona fide* holder does not apply. 2 Parsons on Notes and Bills, 27. The cases of *Pease v. Hirst*, 10 B. & C. 122, and *Barclay v. Lucas*, 1 T. R. 291, are the only authorities cited by opposing counsel that tend to sustain his position. The former was decided in Lord Tenterden's absence

and Parke, J. took no part. Both are opposed to all the other cases; and, if they can be sustained at all, it must be on the ground that the guaranty was to a banking institution, or that the extrinsic evidence showed that the guaranty was continuing in its nature, neither of which is true in the case at bar. The text-books cited by opposing counsel are, so far as applicable to this case, based on these two decisions.

8. The advances by the new firm, however, have been so far paid that nothing is due on the note. Greer is entitled to have the first payments applied in satisfaction of the note. The balance is simply an amount due by Hibbler on his individual account. The law favors the surety, especially if his suretyship is not for a pre-existing debt. If the principal owes another debt, a payment will, in the absence of an application by the parties, be placed to the credit of the secured debt. 2 Parsons on Contracts, 688, notes. The cotton, covered by the trust deed, was received and sold by Bush, Yates & Co., and the proceeds applied to the open account. The application should have been to the mortgage debt. Hibbler's failure to notify them that the cotton was embraced in the trust deed cannot affect Greer. The new firm should have prevented Hibbler from misapplying property which he had conveyed in trust for Greer's protection. A creditor who takes collateral security is bound to hold it impartially and justly for the benefit of the surety. *Payne v. Commercial Bank*, 6 S. & M. 24; *Meyer v. Blakemore*, 54 Miss. 570. To the extent of the value of the cotton, the mortgage debt is satisfied. *Ogden v. Harrison*, 56 Miss. 748; *Webster v. Singley*, 58 Ala. 208; 1 Hill on Mortgages, 278, 279. The surety's liability becomes fixed only when the collateral security is exhausted. *Dussol v. Bruguiere*, 50 Cal. 456; *Wharton v. Duncan*, 83 Penn. St. 40; *Kirkpatrick v. Hawk*, 80 Ill. 122. Doubt as to liability is solved in favor of the surety. *Stull v. Hance*, 62 Ill. 52. A guarantor is discharged by the surrender of any security held by the creditor. 2 Daniel on Neg. Inst. § 1789, note; Fell on Guaranties & Suretyship, 215-217; Story on Prom. Notes, § 485. Dealing with the principal which may vary or enlarge the liability discharges the surety. *Mayhew v. Boyd*, 5 Md. 102. The creditor cannot receive from the



debtor, in satisfaction of one debt, property on which there is a lien to secure another, so as to defeat the right of a surety for the latter debt to have the same applied to the discharge of his liability. *McMullen v. Hinkle*, 39 Miss. 142. Greer, and not Hibbler, was the person to be consulted, for he was the party interested, and him the creditors were bound to protect. *Clopton v. Spratt*, 52 Miss. 251. Hibbler had parted with the title to the cotton for Greer's benefit.

4. The variance was taken advantage of by the defendant before the verdict, by the instruction which was asked and refused. It is difficult to define the ground of the refusal. Emboldened by this ruling, the plaintiffs refused to amend as they could have done. If any part of the contract proved is different from that laid in the declaration, the variance is fatal. *Drake v. Surget*, 36 Miss. 458; *Phipps v. Ingraham*, 41 Miss. 256. How are parties to be compelled to allege the case they intend to prove? The general issue denied every thing. The case of *Carter v. Preston*, 51 Miss. 423, is decisive of this point.

*Barry & Beckett*, on the same side.

1. The statute (Code 1871, §§ 622, 623) does not obviate the necessity for amendment in cases of variance, but provides that, where the opposing party is not misled, it may be made without costs. The defendant took advantage of the defect by his instruction. The difference is material, for the contract is governed by the law of the place where the indorsement is made. *Musson v. Lake*, 4 How. 262; *Aymar v. Sheldon*, 12 Wend. 439; *Hendricks v. Franklin*, 4 Johns. 119; *Hicks v. Brown*, 12 Johns. 142; *Powers v. Lynch*, 3 Mass. 77. If the jury had found a special verdict, that the indorsement was made at Shuqualak, Mississippi, and if that was a defence they found for the defendant, otherwise for the plaintiff, the judgment would have been necessarily for the defendant. The instruction was right and the verdict clearly wrong.

2. The accommodation indorser occupies the place of a guarantor, and may show that in an action at law. *Hardy v. Pilcher*, ante, 18; *Maggett v. Baum*, ante, 22. Advances made after the firm was changed are not chargeable against the guarantor. *Robbins v. Bingham*, 4 Johns. 476; *Walsh v. Bailie*,

10 Johns. 180; *Penoyer v. Watson*, 16 Johns. 100; *Lawrence v. McCalmont*, 2 How. 426, 453; *Boyce v. Edwards*, 4 Peters, 111, 119; *Myers v. Edge*, 7 T. R. 254; *Boston Ice Co. v. Potter*, 123 Mass. 28; *Bellairs v. Ebsworth*, 3 Camp. 53; *Russell v. Perkins*, 1 Mason, 368; *Weston v. Barton*, 4 Taunt. 673, 682; *Bodenham v. Purchas*, 2 B. & Ald. 39; *Kipling v. Turner*, 5 B. & Ald. 261; *Wright v. Russell*, 3 Wils. 530; *Barclay v. Lucas*, 3 Dougl. 321; *Barker v. Parker*, 1 T. R. 287; *Dry v. Davy*, 2 Per. & Dav. 249; *Place v. Delegal*, 4 Bing. (N. C.) 426; *Dance v. Girdler*, 4 B. & P. 34; *Cremer v. Higginson*, 1 Mason, 323; *Strange v. Lee*, 3 East, 484; *Pemberton v. Oakes*, 4 Russ. 154, 167; *Chapman v. Beckinton*, 3 Q. B. 703; *Simson v. Cooke*, 1 Bing. 452; *Stephens v. Benning*, 1 Kay & J. 168; s. c. 6 De G. M. & G. 223; *Tasker v. Shepherd*, 6 H. & N. 575; *Stewart v. Rogers*, 19 Md. 98; 2 Parson on Contracts, 19, 20, 21; 3 Add. on Contracts, § 1121; Story Part. §§ 245-250.

3. Greer's indorsement was not a continuing guaranty for any balance which Hibbler might owe to the amount of the note, but was exhausted when that sum was advanced. *Cremer v. Higginson*, 1 Mason, 323; *White v. Reed*, 15 Conn. 457; *Fellows v. Prentiss*, 3 Denio, 512; *Whitney v. Groot*, 24 Wend. 82; *Rogers v. Warner*, 8 Johns. 119. After that sum was advanced, the first payments would go to its credit. 2 Parsons on Contracts, 21, 23, 633, notes. The advances after the maturity of the note are not chargeable on Greer in any view; and the amount actually advanced by the new firm under the guaranty has been overpaid, for Greer was not liable for Hibbler's individual account.

4. The amount advanced on the guaranty should be credited with the proceeds of the mortgaged cotton. *Whitney v. Groot*, 24 Wend. 82; *Hicks v. Bingham*, 11 Mass. 300; *Winter v. Garrard*, 7 Ga. 183; *Toll v. Hiller*, 11 Paige, 228; *Rogers v. Rogers*, 1 Halst. Ch. 32; Edwards on Bills and Notes, 563; 1 Hilliard on Mortgages, 505, 506, notes. It may have been Greer's duty to see that this cotton was shipped to the creditors, but he was not bound to go to Mobile to see that they made the proper credit. *Clopton v. Spratt*, 52 Miss. 251. A case of grosser negligence than that of these creditors can-

not be conceived. With the cotton in their hands mortgaged to secure the debt, they deliberately misapplied the proceeds, and now seek to hold Greer on the ground of want of knowledge. It was their business to know. Whenever a payment is made by delivery of the property conveyed in a mortgage, the law applies it to the mortgage debt, although the debtor may owe others to the same creditor. *Windsor v. Kennedy*, 52 Miss. 164. If the property of the debtor comes into the creditor's hands, and he has the means of paying the debt, the surety is discharged *pro tanto*. Fell on Guaranties & Suretyship, 216, 217; *Everly v. Rice*, 20 Penn. St. 297; *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119; *Baker v. Briggs*, 8 Pick. 122; *Hayes v. Ward*, 4 Johns. Ch. 123; *Praed v. Gardiner*, 2 Cox, 86; *Commonwealth v. Vanderslice*, 8 Serg. & R. 457; *Lichtenthaler v. Thompson*, 13 Serg. & R. 157; *Hunt v. Bridgham*, 2 Pick. 581; *Law v. East India Co.*, 4 Ves. Jr. 824; *Payne v. Commercial Bank*, 6 S. & M. 24; *Philips v. Astling*, 2 Taunt. 206; *Sneed v. White*, 3 J. J. Marsh. 525; Story on Prom. Notes, § 485; 3 Add. on Contracts, § 1140; 2 Parson on Contracts, 110, and note (t); *Noland v. Clark*, 10 B. Mon. 239.

*R. C. Beckett*, on the same side, made an oral argument.

*Beall & Critz*, for the defendants in error.

1. The objection of variance must be made by motion to exclude the evidence. After verdict, it comes too late. *Stier v. Surget*, 10 S. & M. 154; *Grigsby v. Ford*, 3 How. 184. The defect cannot be taken advantage of by instructions. Besides, the only question raised by the charge asked in this case was as to the law of the contract. The plaintiff in error could not make the point in that vague and clandestine manner. If the variance was material, the plaintiffs had the right to amend. Code 1871, § 623. The defendant was not misled, and hence the variance was immaterial. 1 Greenl. Evid. §§ 63, 275, notes; Stephen on Pl. 107, 108. As the law of the place of payment governs as to the holder's rights, the charge stated what is not law, and for that reason was properly refused. *Ellis v. Commercial Bank*, 7 How. 294; *Hicks v. Brown*, 12 Johns. 142; *Bank of United States v. Donnelly*, 8 Peters, 361; *Cooper v. Waldegrave*, 2 Beav. 282; *Lewis v. Owen*, 4 B. & Ald. 654.

2. The advances by the new firm are secured by the indorsement, which was executed by Greer to make the note negotiable paper. Its negotiation according to the intent of the parties infused life into it, and precluded the defence of want of consideration. *Meggett v. Baum*, ante, 22. As the note and indorsement were designed as a continuing security, the indorser is liable notwithstanding the change in the firm. *Pease v. Hirst*, 10 B. & C. 122; *Barclay v. Lucas*, 1 T. R. 291; *Smith's Merc. Law*, 99; *Collyer Part.* 631. The authorities cited by opposing counsel in support of the general rule that a guarantor is discharged by a change in the partnership in case of unassignable contracts, do not apply, because this is a promissory note payable and indorsed to order, and both the contract and extraneous evidence show the intent of the parties that the surety's liability should follow the instrument into whatever hands it came.

3. Hibbler's fraud, in selling the defendants in error the mortgaged cotton, cannot exonerate Greer. If a principal releases himself by fraud, his surety remains liable. *Gordon v. M' Carty*, 3 Wharton, 410; *Brandt on Suretyship and Guaranty*, § 216. It is the surety's duty, not the creditor's, to watch the principal, and see that he performs his contract. *Harris v. Newell*, 42 Wis. 687; *Wright v. Simpson*, 6 Ves. 714; *Gilbert v. Marsh*, 19 N. Y. 519; *Frye v. Barker*, 4 Pick. 382; *Hunt v. Bridgham*, 2 Pick. 581; *Fulton v. Matthews*, 15 Johns. 433; *Bellows v. Lovell*, 5 Pick. 307; 2 Am. Lead. Cas. (5th ed.) 415; *Page v. Webster*, 15 Maine, 249; *Davis v. Huggins*, 3 N. H. 231; *Mahurin v. Pearson*, 8 N. H. 539; *Hogaboom v. Herrick*, 4 Vt. 131; *Dennis v. Rider*, 2 McLean, 451; *Carr v. Howard*, 8 Blackf. 190; *Taylor v. Beck*, 13 Ill. 376; *Pickett v. Land*, 2 Bailey (S. C.), 608; *Hubbard v. Davis*, 1 Aiken (Vt.), 296; *Montpelier Bank v. Dixon*, 4 Vt. 587; *Baker v. Marshall*, 16 Vt. 522; *Hickock v. Farmers' Bank*, 35 Vt. 476; *Page v. Webster*, 15 Maine, 249; *Bull v. Allen*, 19 Conn. 101; *Pintard v. Davis*, 1 Zab. 632; *Pintard v. Davis*, Spencer (N. J.), 205; *Sasscer v. Young*, 6 Gill & J. 243; *Croughton v. Duval*, 3 Call, 60; *Jenkins v. Clarkson*, 7 Hamm. (Ohio), 72; *Cohea v. Commissioners of the Sinking Fund*, 7 S. & M. 487; *Johnson v. Planters'*

*Bank*, 4 S. & M. 165. The surety may be exonerated from liability, to the extent to which he is prejudiced by the positive act of the creditor in parting with legal or equitable securities, which the latter might have held for the benefit and protection of the surety, but mere passive indulgence or delay, as, for instance, his neglect to possess himself of goods mortgaged to him by the principal debtor as additional security for the ultimate payment of the debt, will not have that effect. *Freaner v. Yingling*, 37 Md. 491; *Black River Bank v. Page*, 44 N. Y. 453; *Crane v. Stickles*, 15 Vt. 252; *Johnson v. Planters' Bank*, 4 S. & M. 165; Theobald on Prin. & Sur. 80; *Caruthers v. Dean*, 11 S. & M. 178; *Pickens v. Finney*, 12 S. & M. 468; *Cohea v. Commissioners of the Sinking Fund*, 7 S. & M. 437; *Payne v. Commercial Bank*, 6 S. & M. 24. Loss of another security by mere passiveness, in the absence of a request to act, has never been held to discharge the surety. *Philbrooks v. McEwen*, 29 Ind. 347; *United States v. Kirkpatrick*, 9 Wheat. 720; 2 Am. Lead. Cas. 391, 397, 401, 410, 447. The trust deed was made for the creditor's protection, not Greer's; and the title did not pass from Hibbler until breach of the condition, prior to which the cotton was sold and paid for. Code 1871, § 2295. No negligence is imputable to the creditors, who could not have even distinguished this cotton from the other bales shipped by Hibbler. *Freaner v. Yingling*, 37 Md. 491. Hibbler was not the creditor's agent. *Farmers' Bank v. Lucas*, 26 Ohio St. 385; *Casoni v. Jerome*, 58 N. Y. 315. His fraud could not discharge his surety, unless the creditors participated therein. *Wayne v. Commercial Bank*, 52 Penn. St. 343; *Griffith v. Reynolds*, 4 Gratt. 46; *Western New York Ins. Co. v. Clinton*, 66 N. Y. 326. It is no defence for the surety against these *bona fide* holders of the note, that the principal without notice to them has misapplied the cotton. *Stoddard v. Kimball*, 4 Cush. 604; *Brandt on Suretyship and Guaranty*, §§ 353, 354, 365.

4. Excluding the advances made after maturity of the note will not affect the result. The debits largely exceed the amount secured by the indorsement, and the contract and course of dealing between the parties show that the security was to cover the balance which should finally be due, at the

maturity of the note. Hibbler had no credit with the firm apart from that due to Greer's name. His individual account is a mere fancy of opposing counsel. If the advances under the indorsement, not paid, are credited with the cotton embraced in the mortgage, it will reduce the amount of the recovery, but the answer to the objections as to Hibbler's personal debt, and the credits after maturity, is that enough is proved to have been advanced on the faith of the indorsement to leave a large balance due.

*F. A. Critz*, on the same side, argued the case orally.

CHALMERS, J., delivered the opinion of the court.

Talbot Hibbler, a merchant at West Point in this State, made arrangements to procure advances during the year, to the amount of three thousand dollars, from Bush, Yates & Co., a firm composed of A. H. Bush and others, cotton factors of Mobile, Alabama, the money advanced to be invested in cotton which was to be shipped for sale to the Mobile firm. The contract was evidenced by a written note for the amount specified, made by Hibbler, dated March 25, 1876, due Dec. 1 thereafter, payable to J. H. Greer or order, and by Greer indorsed to the order of Bush, Yates & Co. Greer was the uncle of Hibbler, and an accommodation indorser of the note. The note was further protected by a trust-deed executed by Hibbler on real and personal property. Hibbler is now a discharged bankrupt, and this suit is against Greer, the indorser, to recover an alleged balance of eight hundred and seventy-nine dollars, due on the note. It will be borne in mind that the note represented not any amount actually loaned upon it at the date of its execution, but sums to be thereafter advanced, and consequently no recovery can be had upon it except to the extent of such advances. One month after its execution, one of the members of the firm of Bush, Yates & Co. died, and a new firm was formed under the same name with a new member. All the assets of the old firm were transferred to, and all its liabilities assumed by, the new one. A few hundred dollars only had been advanced upon the note at the date of the change in the firm, but the full amount was subsequently

advanced; and it being admitted that the payments afterwards made by Hibbler were sufficient to extinguish the advances made by the old firm, but insufficient to liquidate those made by the new one, the first question presented by the record is whether Greer, the indorser, is liable for these latter advances, or whether his liability ceased with the dissolution of the old firm.

The contract of a surety is always *stricti juris*, and where it takes the shape of a guaranty of future advances, the authorities are uniformly to the effect that, in the absence of something in the contract to indicate that it is assignable, the guarantor is not liable if the advances are made by any other than him with whom he entered into the contract. Hence it is held that where a bond of indemnity for the future conduct of another or a letter of credit for future advances has been given, any change in the firm to which it is given will vitiate the claim for subsequent misconduct or advances thereafter made. In such case, the guarantor may well say that he relied upon the outgoing partner for a supervisory control of the conduct indemnified or of the advances to be made, and that he trusted to the business skill of such outgoing partner in restraining, or to his friendship in reporting, any conduct on the part of the principal that would endanger his interest as surety; and therefore, to all claims by the new firm that they are protected by his indemnity, he may successfully respond *in hæc fœdera non veni*. Story Part. §§ 245, 246, *et seq.*; Collyer Part. 443, 444; Brandt on Suretyship & Guaranty, §§ 97-99; Parsons Part. 331, 332. Such is the law where there is nothing in the contract of indemnity to indicate that it is assignable; but, on the contrary, if the contract shows that it was intended to be made assignable, it will justify all to whom it may properly come in trusting to and relying upon it.

In the present case, the guaranty took the shape of a promissory note, payable to order. Is this a sufficient indication that the guarantor (indorser) undertook to be responsible to any and all persons who might, upon the faith of that note when properly transferred to them, make to Hibbler the advances desired by him? It was so ruled, and, we think, cor-

rectly in the only case directly in point that we have been able to find. *Pease v. Hirst*, 10 B. & C. 122. It is obvious that, if the guarantor puts his obligation into the form of negotiable commercial paper absolute upon its face, he subjects himself to the hazard of its passing into the hands of innocent holders for value, who would have the right to hold him, not only upon a contract of indemnity for such sums as had in fact been advanced or might thereafter be advanced, but also for the absolute payment of the entire sum specified. It seems equally clear that, if under such circumstances the paper comes into the hands of a person who knew its true character, he may receive it with the same rights as the original holder. By giving it a negotiable character, the makers have, in effect, said that it may be assigned. But what is there to assign if no advances have been made or can thereafter be made upon it? As we cannot assume that the parties intended a purposeless act, we must conclude that the object of putting the contract in such shape was to authorize its assignment with the same right in the assignee as belonged to the original holder; namely, that of thereafter advancing upon it up to the sum specified. We conclude, therefore, that the indorser, in this instance, was liable as well for the advances made by the new firm as for those made by the original one.

It is objected that in point of fact he was made liable for dealings far in excess of the three thousand dollars specified in the note, the amount recovered being a balance due upon dealings aggregating more than twelve thousand dollars, many of the debits being upon transactions which took place after the maturity of the note, and after it had been protested for non-payment. The money received by Hibbler was advanced from time to time in such sums as demanded, and, as received, was invested in cotton, which when bought was shipped to the Mobile firm. Cotton was frequently bought on margin, and the full amount of its value drawn for as shipped, credit being given by the factors for the amount which the cotton brought when resold in the Mobile market. That the aggregate sum of these dealings exceeded the amount stipulated in the note did not affect the liability to a recovery for the balance due at the maturity of the note, provided such balance did not ex-



ceed three thousand dollars. Such was the course of dealing anticipated between the parties, it being understood that a bale of cotton should be forwarded for every ten dollars advanced, or three hundred bales in the aggregate, the total value of which would, of course, amount to twelve or fifteen thousand dollars, and it was the balance which might be found due upon these transactions up to three thousand dollars that Greer was responsible for.

The account, as sued upon, embraces dealings between Hibbler and the plaintiffs after the maturity of the note, and is, in that regard, erroneous. It was not competent for the factors to continue indefinitely their dealings with the principal and hold the guarantor liable for any and all advances which might be made at any time before the note would become barred by the Statute of Limitations. The contract, having taken the shape of the indorsement of a promissory note due at a certain date, must be held as limiting the liability of the indorser for all sums advanced up to that date or for the balance then due, and not as binding him to pay whatever might become due upon dealings indefinitely prolonged. A restatement of the account, however, upon this basis does not affect the result, the balance due at the maturity of the note being about the same as at the final close of the account.

Part of the cotton shipped by Hibbler, was eleven bales raised upon his own plantation, the entire crop to be grown upon said plantation being embraced in the mortgage given to protect the note. This cotton was mingled with that which was bought on margins and was drawn against in excess of its value at the time of its shipment, so that practically the plaintiffs obtained no benefit from its reception, so far as a liquidation of the amount represented by the note was concerned. It is nevertheless insisted that the receipt of this cotton operated as a payment *pro tanto* upon the note, so far as Greer, the indorser, was concerned. We do not think so. It is true that the delivery of mortgaged property ordinarily operates *eo instanti* as a payment of the mortgage debt to the extent of its value; but in this instance the creditors, misled by the principal debtor, and ignorant that they were receiving mortgaged property, paid to him, at the time of its reception,

its full value in money. Certainly, then, Hibbler cannot claim that the delivery of the cotton operated as a payment on the note, and while his surety might do so, if there had been collusion or even knowledge upon the part of the creditors, he cannot in the absence of such showing. If he is damnified by the transaction, it is by the act of him for whose conduct he had bound himself. To permit him now to claim credit for property, thus unwittingly paid for by the creditors in consequence of the concealment or omission of his principal, would be to allow the perpetration of a fraud upon those who were in no respect in default. The right of Greer to claim the benefit of the security afforded by the mortgage given by his principal was a mere equity, and he cannot be allowed to assert it against the creditors under circumstances where their equity is as strong as his, and where to allow him to assert it operates a fraud upon them.

The question of variance discussed by counsel cannot be noticed, because no objection was made before verdict. We do not consider the instruction asked by the defendant and refused, as sufficiently admonishing the court or the plaintiffs that the question of variance between the declaration and proof was intended to be raised. Such objections should be explicitly and distinctly made, in order that the court may determine whether it is a proper case for amendment.

*Judgment affirmed.*

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GEORGE ELLISON v. W. C. LEWIS.

1. REPLEVIN. *Venus.*

Replevin before a justice of the peace may be brought in the county where the goods are found, although the defendant is a resident freeholder and householder of another county. *Cain v. Simpson*, 53 Miss. 521, distinguished.

2. VENUE. *Freeholder and householder.*

One who is neither a freeholder nor householder can be sued in any action, wherever he is found.

ERROR to the Circuit Court of Warren County.

Hon. UPTON M. YOUNG, Judge.

*Birchett & Gilland*, for the plaintiff in error.

Replevin at common law, as under our statute, is purely a local action and depends on the *situs* of the property. If the sheriff returns the writ "no property found," although it is served on the defendant, the suit can proceed no further. The statute does not provide for any of the consequent writs of the common law. The statutory action of replevin is a proceeding *in rem*, which the court has no power to try unless the property is within its territorial jurisdiction. *Turner v. Lilly*, 56 Miss. 576. If the action can be brought only in the county of the defendant's residence, an expert person can defeat the remedy by keeping property, which he has wrongfully taken, in a county where he does not reside, or a thief can escape with a horse if he avoids going through the county of his residence, by riding past the owner's door.

*Shelton & Crutcher*, for the defendant in error.

CAMPBELL, J., delivered the opinion of the court.

The plaintiff sued out a writ of replevin in Vicksburg, Warren County, for a mule which was there, and was seized under the writ, and the defendant was summoned there to answer the action. He appeared, and made affidavit that he was a resident of Hinds County, at the time of the suing out of the writ, and upon this affidavit moved to dismiss the case for want of jurisdiction in the court in Warren County. The writ was issued by and returnable before a justice of the peace in Vicksburg. The motion to dismiss was denied by the justice of the peace, but on appeal to the Circuit Court a motion to dismiss the case because the justice had no jurisdiction was sustained.

The motion was improperly sustained. The affidavit does not show that the defendant was a "freeholder or householder" of Hinds County, and, if neither, he might be sued, wherever found in any action. But if he was a freeholder and householder, resident in Hinds County, it was the right of the plaintiff to sue out the writ of replevin for the mule in Vicksburg, where it was at the time, and the seizure of the mule there gave the justice of the peace of that district jurisdiction of the

case. Replevin is for a particular thing, and where the thing is found is the proper venue of such action. The action of replevin is *sui generis* and governed by its own provisions, as found in the Code. The affidavit, writ and pleadings in the action are all provided for in the chapter applicable to the action of replevin. In it there is no direction as to where the action shall be brought. The right to the writ is given, and the terms of its issuance are prescribed, and Code 1871, § 1530, directs that "the writ of replevin shall command the sheriff or other lawful officer of the *proper* county to take the goods." The "*proper county*" must be that in which the goods are. Sect. 1303 of the Code defines the territorial jurisdiction of justices of the peace as being coextensive with their county, but subject to the right of every freeholder or householder of the county to be sued in the district of his residence, or in the district in which the debt was contracted, the liability incurred, or in which the property may be found. In *Cain v. Simpson*, 53 Miss. 521, we held that a freeholder or householder, resident in one county and visiting another, could not be sued in the latter county before a justice of the peace. That was a personal action for a debt, and a careful consideration of all the statutes led to the conclusion that the only way in which to guard the right of the defendant in such case was to deny jurisdiction in the justice of the peace of another county than that of the residence of the defendant. That conclusion was suggested by the manifest purpose of the statutes to secure to a defendant the right to be sued in his county, if he is a freeholder or householder resident there. But the action of replevin is different. In it the seizure of the thing gives jurisdiction. The defendant is required to be summoned, that he may contest the claim of the plaintiff to the thing seized. Without a seizure of the thing, the action fails, although the defendant be found and summoned. We fail to find any statutory provision for a justice of the peace of Hinds County, upon an affidavit made before him, to issue a writ of replevin to Warren County. Sect. 1303 of the Code authorizes a justice of the peace to "issue any process in matters within his jurisdiction, to be executed in any part of his county." Sect. 1320 authorizes the issuance of a

summons to any other county than that in which the suit is brought, where there are two or more defendants. No statute authorizes replevin to be brought before a justice of the peace in one county, and his issuance of the writ of replevin to another county. The command of the writ of replevin is to take the goods described in the affidavit, and dispose of them as directed, and to summon the defendant. If affidavit were made in Hinds County, and the writ of replevin issued to Hinds County, it could not be executed according to its command. The defendant might be summoned, but the action would fail, unless the goods were taken under the writ. They could not be taken under the writ in Hinds County, because not there. We conclude that replevin may be brought in the county in which the goods are found, without regard to the county of the residence of the defendant. A Circuit Court has power to issue process to any county in the State. A justice of the peace has such power only in those cases in which it is conferred expressly or by fair implication. No statute authorizes a justice of the peace to issue a summons for the defendant in the county of such justice, and a writ of replevin to another county.

*Judgment reversed and cause remanded.*

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W. W. SMITH v. THOMAS MULHERN ET AL.

ATTACHMENT. *Garnishment. Jurisdiction. Territorial limits.*

The courts of the county of a garnishee's residence have jurisdiction of an attachment against a householder who resides in another county, to whom the garnishee is indebted. *Cain v. Simpson*, 58 Miss. 521, distinguished; *Barnett v. Ring*, 55 Miss. 97, cited.

ERROR to the Circuit Court of Noxubee County.

Hon. JAMES M. ARNOLD, Judge.

The plaintiff in error sued out an attachment before a justice of the peace in Noxubee County against Thomas Mulhern, his debtor, under Code 1871, § 1420, and Thomas Henry, a

resident of the county, was summoned as garnishee. Mulhern was not found, but was published for as a non-resident, and on the return day, his counsel appeared with an affidavit, alleging that he was a householder and resident of Madison County, and moved to dismiss the suit. The motion was overruled by the magistrate, and no further defence being made, judgment was entered, subjecting the fund in the hands of the garnishee. The defendants in error appealed to the Circuit Court, where the motion was renewed upon the same affidavit and sustained.

*Thomas J. O'Neill*, for the plaintiff in error.

As the affidavit for attachment was under Code 1871, §§ 1419, 1420, the defendant, if he desired to contest it, should have pleaded in conformity with §§ 1459, 1461, and if injured, redress is furnished by § 1462. Code 1871, § 1808, requiring householders to be sued in the district of their residence, does not apply to attachments against debtors. The attachment law must be construed liberally for the benefit of creditors, the suppression of fraud, and the advancement of justice. *Wheeler v. Slavens*, 18 S. & M. 623. Obviously the decision in *Cain v. Simpson*, 53 Miss. 521, is inapplicable to an attachment suit. Any act which constitutes fraud gives jurisdiction by attachment in the county where it is committed, if property of the debtor can be found there. *Evans v. Mills*, 16 Texas, 196. The question is settled in favor of the plaintiff in error by the case of *Barnett v. Ring*, 55 Miss. 97.

*Rives & Rives*, for the defendants in error.

The only question presented by this record is settled in the case of *Cain v. Simpson*, 53 Miss. 521. No statute establishes a different rule as to venue in attachment cases from the one which prevails in other proceedings. The case of *Barnett v. Ring*, 55 Miss. 97, establishes no such distinction, but rather the contrary. The rule is the same in all actions of assumpsit, whether begun by attachment or otherwise. When the action is brought in a different county from that of the defendant's residence, his course is to apply for a change of venue if the suit is commenced in the Circuit Court. But if the action is brought before a justice of the peace, as no pro-

vision for change of venue exists, his motion to dismiss must be sustained.

CAMPBELL, J., delivered the opinion of the court.

The courts of Noxubee County had jurisdiction of the attachment. The fact that the defendant had effects in that county made it proper to sue out an attachment there, returnable to the proper court of that county, although the defendant resided in another county. *Barnett v. Ring*, 55 Miss. 97. It was improper to dismiss the case. If the defendant desired to controvert the affidavit made by the plaintiff to obtain the attachment, his course was to plead in abatement, when an issue would have been made and tried as directed by the statute. Code 1871, § 1458, *et seq.* We have decided that a freeholder or householder must be sued in the county of his residence. *Cain v. Simpson*, 58 Miss. 521. But this applies to the suit by summons provided for by § 1805 of the Code, and not to attachments which are governed by a different law, which makes jurisdiction to depend, not on the residence of the defendant, but on the presence of his effects, against which the attachment may be directed. The law confers on the creditor of one who subjects himself to the extraordinary remedy by attachment the right to obtain this process in any county in which may be found any effects of the defendant subject to it. The presence of a debtor of the defendant who may be garnished is sufficient to confer jurisdiction of the attachment in which such debtor is garnished upon the proper court of the county of the residence of the garnishee. The statute has guarded the right of the defendant in an ordinary action by summons to be sued where it may be supposed it is convenient for him to defend; but in the extraordinary proceeding by attachment, the right of the creditor to seize the effects of his debtor is of paramount consideration, and therefore he is authorized to sue out his attachment where such effects are, without regard to the residence of the defendant in a particular county. The affidavit and bond required of the attaching creditor are intended as safeguards against abuse of the process of attachment, and a protection to the debtor against its wrongful employment; and for a wrongful suing out of an attachment,

the damages which may be awarded the defendant are designed as an indemnity to him, and experience proves that defendants generally find the damages awarded ample compensation for any wrong done them.

*Judgment reversed and cause remanded.*

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SALLIE J. CONNOR v. A. W. TIPPETT ET AL.

1. STATUTE OF FRAUDS. *Conveyance of contract for land.*

Two persons, each of whom owns and occupies a tract of land under a bond for title, cannot, under the Statute of Frauds, exchange the tracts by surrendering them and delivering the respective title-bonds to each other.

2. ESTOPPEL. *Restoration of status quo.*

*Quære*, whether one of the persons can enjoin the other from asserting title to the land which he surrendered, upon the ground that he has disposed of that which he received.

ERROR to the Chancery Court of Noxubee County.

HON. L. BRAME, Chancellor.

*Rives & Rives*, for the plaintiff in error.

The sale of an equity in land is not within the Statute of Frauds. In several cases this court has sustained verbal sales of such interests. *Russell v. Watt*, 41 Miss. 602; *McLain v. Thompson*, 52 Miss. 418. If a note, secured by lien, is assignable by delivery, why is not a bond for title? To hold that the statute applies to all interests in land would seriously embarrass the business of the country. W. M. Connor is estopped to defend, upon the ground that no title passed, for he is insolvent, and has sold the land which he received. *Shivers v. Simmons*, 54 Miss. 520. Matter of estoppel may be invoked by a complainant as a ground for relief. *Swain v. Seamans*, 9 Wall. 254, 272; *Grist v. Forehand*, 86 Miss. 69; *Davis v. Bowmar*, 55 Miss. 671.

*Jarnagin, Bogle & Jarnagin*, for the defendants in error.

Nothing takes this case out of the Statute of Frauds. No written instrument, however perfect, is sufficient of itself to



convey title to land so long as it remains in the exclusive possession of the vendor. *Johnson v. Brook*, 31 Miss. 17; *Jelks v. Barrett*, 52 Miss. 815, 824. An exchange of lands stands on the same footing as a sale. *Moss v. Culver*, 64 Penn. St. 414. A parol contract for the exchange of lands, accompanied by the transfer, by delivery of the bonds for title and mutual surrender of possession, does not meet the requirements of the statute. Code 1871, § 2896. It is no more than part-performance of a verbal contract. *Box v. Stanford*, 13 S. & M. 98. W. M. Connor had such an interest in the land that even under the lax rules of the English courts the bill would be dismissed. *Bell v. Howard*, 9 Mod. 302. He was the owner in possession, who could devise, sell, or incumber the land, and Tippet held the legal title as his trustee. No exception to the statute is permissible. *Beaman v. Buck*, 9 S. & M. 207; *Hairston v. Jaudon*, 42 Miss. 380. Estoppel cannot create an exception. Bigelow on Estoppel, 448, n. 4. To admit one exception opens the door to the whole series. The cases referred to by the opposing counsel do not relate to the Statute of Frauds. In *Shivers v. Simmons*, the deed was written and signed, but the acknowledgment was defective.

CHALMERS, J., delivered the opinion of the court.

W. S. Connor owned and occupied, under a bond for title, a tract of land in Noxubee county, known as the Walker tract. W. M. Connor owned and occupied, in the same way, a tract known as the Tippet place. They agreed to exchange lands, and each surrendered to the other possession of the respective tracts, and transferred by delivery the respective title-bonds. No written assignment was made as to either. The full amount due on the Tippet place to the original vendor having been paid, this bill is filed by the widow of W. S. Connor against A. W. Tippet and W. M. Connor to compel the execution and delivery of a deed. W. M. Connor demurs on the ground that his interest in the land, under the title-bond, did not pass by the bare delivery of that instrument, without a written assignment, and that to force him now to make a conveyance would be a violation of the Statute of Frauds.

The demurrer was properly sustained. An equity in lands is as much within the Statute of Frauds as the legal title, and it is no more competent to convey the one by parol than the other. So also a verbal contract to buy a contract for lands, or, in other words, to buy another man's rights, under an executory contract for the sale of lands to him, is within the statute and void. Browne on the Statute of Frauds, § 229; *Smith v. Burnham*, 8 Sumner, 435; *Simms v. Killian*, 12 Ired. 252; *Rice v. Carter*, 11 Ired. 298; *Richards v. Richards*, 9 Gray, 313. Whether, under the principle laid down in *Shivers v. Simmons*, 54 Miss. 520, the complainant would have the right to enjoin W. M. Connor, or those claiming under him, from asserting title to the Tippet place, upon the ground that he has aliened the Walker place, and thereby rendered a restoration of the *status quo* impossible, can only be determined when there has been such assertion, and upon a bill filed to enjoin it.

*Decree affirmed.*

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MADISON LOVE v. WILLIAM LAW.

1. AGRICULTURAL LIEN LAW. *Implied contract.*

Under the agricultural lien law (Acts 1876, p. 109) a writ of seizure will lie against a tenant, although there is no express contract to pay rent; for the word "agreed" in the statute embraces an agreement implied by the conduct of the parties.

2. LANDLORD AND TENANT. *Holding over. Liability for rent.*

If a man who has been a tenant for years, continues after the expiration of his lease to occupy the demised premises without a new contract, he is liable as a tenant from year to year at the same rate that he paid.

3. SAME. *Defence of adverse title. Estoppel.*

Such a tenant cannot, when sued for the rent, set up an adverse title in his wife, to defeat the landlord's claim.

ERROR to the Circuit Court of Madison County.

Hon. S. S. CALHOON, Judge.

A writ of seizure, sued out by the defendant in error before a justice of the peace, for seventy-five dollars, rent for the year 1879, was levied on cotton raised upon the premises

occupied by the plaintiff in error, who defended on the grounds that his wife held a deed to the land, executed in 1873, and that in December, 1878, at the close of the fourth year of his occupancy, he had notified the plaintiff that he would rent the premises no longer. The plaintiff proved that the defendant had been in possession of the premises as his tenant for four years, and that he notified him in 1878 that he should charge him rent if he remained there during the year 1879. On appeal from the justice of the peace, the Circuit Court rendered judgment in the plaintiff's favor, condemning the cotton.

*J. W. Downs*, for the plaintiff in error.

The evidence shows a refusal, not an agreement, to pay rent, and under the agricultural lien law (Acts 1876, p. 109), which allows a writ of seizure only for rent "agreed to be paid," this action did not lie. Love was not a tenant in 1869, and was not, therefore, precluded from setting up the outstanding title. No contract by implication grows out of the transactions of the parties, but after the expiration of the lease Love held adversely to the defendant in error.

*W. H. Dudley*, for the defendant in error.

The plaintiff in error, who acquired possession under his landlord's title, and, after holding thereunder for four years, was notified that he would be charged rent if he continued to occupy the premises during the year 1879, was a tenant holding over, and could not question his landlord's title. His remaining the fifth year implied an agreement to pay rent, and gave the statutory lien upon his agricultural products raised upon the land for that year.

CAMPBELL, J., delivered the opinion of the court.

To entitle a landlord to a writ of seizure, under "An Act to provide for Agricultural Liens, and for other purposes," approved April 14, 1876 (Acts 1876, p. 109), it is not necessary that there should have been an *express* contract to pay rent. The act creates a lien "for the rent agreed to be paid;" but an agreement may be implied, and the word "agreed" embraces an agreement implied by the conduct of the parties. Upon the facts disclosed by the record, the landlord could

maintain a distress for rent. It is firmly established that where a tenant continues to occupy land which he has held under a contract of leasing, without a new contract, he is liable as a tenant from year to year, at the same rate that he paid before, and is subject to distress for rent. *Neal v. Allison*, 50 Miss. 175; *Taylor's Landlord and Tenant*, § 564. Love had been a tenant of Law for years. He could not remain in possession of the leased premises and set up an adverse title to the land against Law. He was still a tenant if Law chose to consider him such, and is held by the law to have agreed to pay rent, as before.

*Judgment affirmed.*

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J. GREEN ET AL. v. J. M. CHILTON.

**BANKRUPTCY. Discharge. Fiduciary debt.**

The liability to a bank of its collecting agent, resulting from his appropriating to his own use the proceeds of notes and drafts sent to him by the bank, to which they were intrusted for collection, is not a fiduciary debt, and is dischargeable under the bankrupt law.

ERROR to the Circuit Court of Hinds County.

Hon. S. S. CALHOON, Judge.

*M. Green*, for the plaintiffs in error.

The defendant held the money in a fiduciary capacity, within the meaning of the U. S. Rev. Stats. § 5117. If the bankrupt receives money as agent, to be applied in a particular way, or for a specific purpose, for the use of the principal, his discharge does not relieve him from liability. *In re Kimball*, 6 Blatch. 292; *In re Seymour*, 1 Ben. 348; *In re Kimball*, 2 Ben. 554; *Duguid v. Edwards*, 50 Barb. 288; *Treadwell v. Holloway*, 46 Cal. 547. The rule was the same under the act of 1841. *Matteson v. Kellogg*, 15 Ill. 547; *Flagg v. Ely*, 1 Edm. Sel. Cas. 206; *White v. Platt*, 5 Denio, 269. Cases like *Cronan v. Cotting*, 104 Mass. 245, and *Grover & Baker Sewing Machine Co. v. Clinton*, 5 Biss. 824, hold that even a factor, who has the right to mix the funds and use the

balance, is not discharged. But no case can be found which decides that an agent, who holds money for a specified purpose, does not sustain a fiduciary relation.

*S. M. Shelton*, for the defendant in error.

The object of the bankrupt law is to relieve the bankrupt of all debts due by him at the time of filing his petition, with certain specified exceptions. The exception involved in this controversy is embraced in the section of the statute referred to by opposing counsel. Following the construction of a similar section of the Bankrupt Act of 1841, by the Supreme Court of the United States, in the case of *Chapman v. Forsyth*, 2 How. 202, the latest and best authorities hold that only debts created in cases of express or technical trusts are embraced in that exception. *Neal v. Clark*, 95 U. S. 704; *Keime v. Graff*, 17 B. R. 319; *Grover v. Clinton*, 8 B. R. 312; *Croonan v. Cotting*, 104 Mass. 245.

CHALMERS, J., delivered the opinion of the court.

J. & T. Green, bankers in the city of Jackson, forwarded for collection to J. M. Chilton, their correspondent and agent, at Clinton, certain drafts and notes which had been intrusted to them by their foreign correspondents. Chilton collected the paper, appropriated the proceeds to his own use, and now, to this suit by the Greens to recover the amount from him, interposes a plea of a discharge in bankruptcy, granted him since the reception of the money. The legal question presented is whether the liability was a fiduciary debt within the meaning of the bankrupt law, and therefore not dischargeable in bankruptcy.

It was held in *Chapman v. Forsyth*, 2 How. 202, that the words "fiduciary debts," used in the bankrupt law of 1841, embraced only liabilities arising under technical or express trusts strictly so called, and not implied trusts or those springing from contract. This construction would exclude from the operation of the words the liability here involved. It was held in the case of *In re Kimball*, 2 B. R. 204, 354, both by the District and Circuit Courts for the Southern District of New York, that the Bankrupt Act of 1867 was broader than that of 1841, and that all debts were to be considered as of a fiduci-

ary character where any element of trust entered into the circumstances of their creation. This decision made by Judge Blatchford, and affirmed by Judge Nelson, has been extensively followed elsewhere; but more recently a different doctrine has prevailed, and it now appears settled that there is no substantial difference between the acts of 1841 and of 1867 in this regard. Such is the express adjudication in *Grover v. Clinton*, 8 B. R. 312; *Keime v. Graff*, 17 B. R. 319; *Cronan v. Cotting*, 104 Mass. 245; and such seems to be the doctrine of the Supreme Court of the United States in *Neal v. Clark*, 95 U.S. 704. Adopting the later decisions as affording the proper construction of the act of 1867, it follows that the liability of the defendant was not embraced in the exception as to fiduciary debts, and was released by the discharge in bankruptcy.

*Judgment affirmed.*

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**SOCIETY OF NEW YORK HOSPITAL v. MARTHA L. KNOX  
ET AL.**

**1. APPEAL.** *During term. Return day. Citation.*

If an appeal is granted by the court at the term when the decree appealed from is entered, no citation is required, and the case should be docketed at the next term of the Supreme Court, although it occurs within less than ten days after the appeal is taken.

**2. SAME.** *After adjournment. The ten days.*

If, however, the appeal is granted after the term at which the decree appealed from is entered, Code 1871, § 431, requires citation to be issued and served on the appellee ten days prior to the return day of the appeal.

**3. SAME.** *Supreme Court practice. Continuance.*

The fact that an appeal in the former case is taken so near the return day of the Supreme Court as to exclude reasonable time for preparation, should be considered on an application for a continuance or for delay in calling the case.

THIS is a motion to docket the case for hearing at the present term of court, on the following state of facts: At the term at which the decree was rendered, the appeal was prayed by a

written petition to the court which made an order granting it on the appellant's giving bond. An order was made of record by the court approving the bond, when presented, and perfecting the appeal, and upon the same day the appellee's counsel acknowledged notice thereof. Five days afterwards, this court met.

*D. Shelton*, for the motion, argued orally and in writing.

Code 1871, § 431, provides that where appeals are granted by the clerk, he shall issue citation which shall be served ten days before the return day. But no statute provides for such notice where the appeal is prayed at the time the decree is rendered, and perfected in open court. In the latter case, the appellee and his counsel are bound to take cognizance of the appeal, while in the former they are not supposed to be present. This court can protect the parties if sufficient time for preparation is not given. Citation is but a substitute for the notice given by an appeal in open court.

*Frank Johnston, contra*, filed a brief and argued orally.

If an appeal in open court dispenses with citation, it does not do away with the necessity for notice. Citation is only a mode of giving notice, and an appeal in open court is but a substitute for citation. The time of the implied notice should not be shorter than actual service. If ten days is not required, what is the time? Cannot an appeal be docketed on the first day of the term from a decree rendered that day? All that day is allowed for filing records. It is useless to say that this court can protect the parties by continuance, for that is to practise under the rule while denying its force. The better way is to adhere to the statutory time of ten days, which will render delays unnecessary.

GEORGE, C. J., delivered the opinion of the court.

It is objected that this case cannot be docketed for trial at this term of court, but should be docketed at the October Term. The appeal was taken on April 14, less than ten days prior to the commencement of this term, and it is insisted that in such case the appeal is properly returnable to the next succeeding term. This is true of appeals granted after the term in which the decree appealed from is entered, for as to them

Code 1871, § 431, requires citation to be issued and served on the appellee ten days prior to the return day of the appeal. But no citation is required when the appeal is granted by the court in term time, and at the same term at which the order or decree appealed from is entered. The appellee is presumed to be present when the appeal is allowed, and is bound to take notice of it as of every other order entered in the cause. The statute, Code 1871, § 408, requires all appeals to be made returnable to the first day of the term of this court, or the first return day fixed by order of court next succeeding the appeal. As to appeals in which citation is required, the ten days, when required, has the effect of making the appeal returnable after the expiration of that time. But that section can have no operation except in the cases embraced in it, viz., appeals granted after the term at which the decree appealed from is entered. Should an appeal be taken so near the commencement of the term or the return day fixed by order of court, as not to allow reasonable time for the parties to prepare the cause for hearing, that matter would be considered on an application either for a continuance or for delay in calling the case for hearing.

*Record ordered to be docketed to this term.*

57	602
72	655

57	602
93	730

### J. W. VICK v. GEORGE LA ROCHELLE.

**CORPORATION. Shareholder. Liability for corporate debts.**

Liability of a stockholder, to the extent of his unpaid subscription, under Code 1871, § 2413, to a creditor of the corporation, whose debt was contracted during his ownership of the stock, is not discharged by a release executed by the corporation when solvent in consideration of a payment in excess of the calls and a surrender of half his shares.

**ERROR to the Circuit Court of Warren County.**

**Hon. UPTON M. YOUNG, Judge.**

*W. B. Pittman*, for the plaintiff in error.

A solvent corporation can for valuable consideration cancel the subscription of one of its subscribers to its capital stock.



At common law, such a transaction would not be fraudulent as to the company's creditors. It is not forbidden by law, and is within the purposes for which the corporation was chartered. Code 1871, § 2413, does not admit of the construction for which opposing counsel contends. Only instalments that have been called for under the charter and by-laws of the company are "due." The word "unpaid" includes only sums of money which might become due and payable to the company by future calls or assessments of the stock. Payment is the fulfilment of a promise or the performance of an agreement. Bouvier's Law Dic., title Payment. When it is pleaded, the defendant must prove the payment of money or something accepted in its stead. "Unpaid" is the reverse, and means that the obligation has not been fulfilled, or that the creditor has not received money or something in its stead in satisfaction of the debt. Vick, the debtor, paid the corporation, the creditor, in money and stock, which was its own liability. Nothing remains "due" or "unpaid." The statute in question merely gives a less cumbersome remedy to enforce a right which was before recognized in courts of equity, and by virtue of which creditors of an insolvent corporation could maintain a bill to subject subscriptions for stock due or unpaid. It has been repeatedly held that a settlement like the one at bar relieved the shareholder. *New Albany v. Burke*, 11 Wall. 96; *Gelpcke v. Blake*, 19 Iowa, 263. In *Upton v. Tribilcock*, 91 U. S. 45, the shareholder attempted to set up an outside agreement that he should pay no more assessments, and the agreement was void for want of consideration.

*A. M. Lea*, for the defendant in error.

While it is true that at common law shareholders are not individually liable for corporate debts, yet it is a favorite doctrine of the American Courts that the capital stock as well as other property of a corporation shall be deemed a trust fund for the payment of its debts. Thompson on Stockholders, §§ 10, 11, 15, and notes. The capital stock, subject to the operation of this rule, is all the stock for which the members have subscribed. In the absence of any statutory provision, the cases are numerous in which unpaid subscriptions have been treated as corporate assets, and subjected to

the claims of creditors. Code 1871, § 2413, is, therefore, no enlargement of the shareholders' liability, but by its terms a clear, distinct and several liability at law is imposed upon each holder of stock whose share is not fully paid up. This is merely a remedy added to the one already existing in equity by which unpaid subscriptions could be reached. *Vick v. Lane*, 56 Miss. 681; Thompson on Stockholders, §§ 37, 38. The statutory liability can be avoided only by an actual payment of the subscription or a transfer of the stock. The plea sets up neither, but only an arrangement with the company, which cannot affect the creditor. Thompson on Stockholders, §§ 200, 201, 205, and notes. In fact the arrangement is *ultra vires*. *Burke v. Smith*, 16 Wall. 390. Every such arrangement which diminishes the capital stock is a fraud upon the other stockholders, upon the public, and upon the creditors of the company. *Upton v. Tribilcock*, 91 U. S. 45. Our statute under which this action is brought is only in aid of the doctrine announced in those cases, and of a wise public policy. To sustain the arrangement set out in the plea will furnish an easy process by which corporations and their stockholders can thwart its salutary purpose.

CAMPBELL, J., delivered the opinion of the court.

The substance of the plea demurred to is, that the defendant had been released by the corporation, at a time when it was solvent, from further liability on his subscription for stock, in consideration of a payment by him of a part of his subscription, which was in excess of the calls made upon stockholders by the company, and a surrender by him of one half of his shares of stock. The declaration shows that the defendant was a stockholder in the corporation, when the debt sued on was contracted. The plea seeks to avoid the liability of the defendant to the creditor of the corporation, by the act of the corporation in releasing him from his subscription, upon his payment for part of his stock and his surrender of the remainder. The demurrer presents the question of the sufficiency of the release by the company as a discharge to the defendant from liability to the creditor of the corporation.

The statute, § 2413 of the Code, provides that "each stock-

holder shall be individually liable for the debts of the corporation, contracted during his ownership of stock, for the amount or balance that may remain due or unpaid for the stock so subscribed for by him, and may be sued by any creditor of the corporation, and such liability shall continue for one year after the sale or transfer of the stock." The interpretation of this statute is not a matter of difficulty or doubt. Its object and effect are plainly indicated. "The amount or balance that may remain due or unpaid," meant by the statute, is so much of the amount subscribed for stock as has not been paid according to the terms of the subscription. The subscriptions for stock constitute the means of the company, on the faith of which credit is given, and each subscriber for stock is liable for all debts contracted during his ownership of stock, and for one year after he has transferred it to another to the amount of his subscription not paid according to its terms. A release by the corporation, without payment of the amount of the subscription does not affect the right of the creditor to hold the stockholder to his statutory liability. A failure of the corporation to call for payment of stock subscriptions, or any concession by it to the stockholder who has not paid his subscription, does not affect the right of the creditor to collect his debt from the stockholder to the extent of the amount of his subscription for stock which remains unpaid. Actually unpaid, whatever may have occurred between the subscriber and the corporation, is what the statute means.

*Judgment affirmed.*

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JOHN C. MITCHELL ET AL. v. COLUMBUS DRAKE.

1. AGRICULTURAL LIEN LAW. *No personal judgment.*

In a proceeding by writ of seizure under the agricultural lien law, (Acts 1876, p. 109) no personal judgment can be rendered for the debt. *Hartsell v. Myers, ante, 135, cited.*

2. SAME. *Claimant's bond. Duty of officer.*

The officer who seizes products under such proceeding before a justice of the peace must hold them subject to the result of the suit, and cannot surrender them to a claimant on a forthcoming bond.

3. *SAME. Bond unauthorized by statute. Common-law action thereon.*

If such bond is taken, no summary judgment can be rendered thereon in the lien suit, but it may be sued on as a common-law obligation.

4. *SAME. Judgment. Officer's liability.*

The proper judgment for the plaintiff, in the lien suit, under such circumstances, is condemnation and sale of the products, leaving him at liberty to proceed against the officer for failure of duty or to sue on the bond.

**ERROR to the Circuit Court of Warren County.**

Hon. UPTON M. YOUNG, Judge.

*Pittman, Pittman & Smith*, for the plaintiffs in error.

No judgment could be rendered on the claimant's bond in this case, because the statute (Acts 1876, p. 111), by virtue of which the proceeding is instituted, authorizes no bond except in cases within the jurisdiction of the Circuit Court. The statute contemplates the speedy termination of such controversies in the justice's court, and it provides that the practice in such cases in the Circuit Court shall conform to that in the magistrate's court "except that judgment may be rendered in the cause upon the bond." As the justice had no authority to render judgment on this bond, the Circuit Court had none on appeal. *Askew v. Askew*, 49 Miss. 301.

No counsel for the defendant in error.

CHALMERS, J., delivered the opinion of the court.

Columbus Drake sued out before a justice of the peace a writ of seizure under the agricultural lien law of 1876, against Doc Drake, which was levied by the officer upon fourteen hundred pounds of lint cotton. John C. Mitchell propounded a claim for the cotton, and was allowed by the officer to take possession of it upon the execution of a forthcoming bond as in cases of attachment. Upon the trial before the justice, a personal judgment was rendered against the defendant and a judgment in favor of the claimant as to the ownership of the cotton. From this judgment in favor of the claimant, the plaintiff appealed to the Circuit Court, and the claimant making default in that court judgment was rendered against him and the surety on his bond for the value of the cotton as ascertained and fixed under a writ of inquiry.

From this judgment, the claimant and his surety sued out a writ of error.

The case must be reversed. The court had no jurisdiction to give a personal judgment against the defendant. Its sole duty was to dispose of the cotton. *Hartsell v. Myers*, ante, 185. But this judgment was not appealed from. Neither did the officer have any authority to take the claimant's bond and surrender the cotton. It is expressly made his duty by law, where property is seized under proceedings before a justice of the peace, to "hold such property so seized subject to the result of the suit." Acts 1876, p. 111. The bond not being authorized by statute cannot be made the basis of a summary judgment in this proceeding, but must be sued on by the officer or by the plaintiff in a common-law action. The judgment should have been for a condemnation and sale of the cotton, treating it as still in the hands of the officer, and leaving the plaintiff at liberty to proceed by motion against the officer for a failure of duty or by suit at law upon the bond. This judgment may be entered here.

*Judgment accordingly.*

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THOMAS W. SIMS ET AL. v. W. F. EILAND ET AL.

1. DECEIT. *False recommendation. Scienter.*

An action for deceit in writing a false statement concerning another, whereby the latter obtained credit, cannot be maintained unless the defendant made the false statement knowingly. *Sims v. Eiland*, ante, 83, affirmed.

2. SAME. *Representation without knowledge.*

A person who represents as a fact that of which he has no knowledge and no well-founded belief, and which is false, is chargeable with having made a false statement knowingly.

3. SAME. *Honest mistake. Good faith.*

Persons who write in a letter, simply to introduce the bearer, statements whereby he obtains credit, are not liable in an action for deceit, if they write in good faith the facts as they on sufficient ground believe them to exist, although he subsequently proves untrustworthy.

ERROR to the Circuit Court of Noxubee County.

Hon. JAMES M. ARNOLD, Judge.

James Kincannon, desiring to obtain advances of money from the plaintiffs in error, who did business in Mobile, Alabama, as commission merchants, under the firm name of Sims, Harrison & Co., to enable him to control shipments of cotton which he proposed to consign to them and share in the commissions, obtained from the defendants in error a letter signed by them, and directed to the plaintiffs in error, with which he introduced himself. The letter stated that it would be handed to the plaintiffs by the defendants' old friend, James Kincannon, who would visit Mobile on business which he would explain to them; that he had been long and favorably known to the defendants, and it gave them pleasure to say that any statements which he made to the plaintiffs could be implicitly relied on, and that any favors which they showed him would be thankfully received both by him and the defendants. The plaintiffs, in reliance upon the letter, advanced to Kincannon, who was a stranger to them, a large amount of money. His statements and promises proved unreliable, and they lost the greater part of the advance. After prosecuting Kincannon to insolvency, they brought this action against the defendants for deceit. The pleadings having been settled at the last term of this court, *ante*, 83, a trial was had, and the plaintiffs proved the foregoing facts. The defendants, after evidence tending to show that Kincannon's reputation when the letter was written was as therein represented, were examined in their own behalf, and each testified, under the plaintiffs' objection, that he had known Kincannon a long time, and honestly believed the statements of the letter to be true when it was written, that Kincannon was a truthful and upright man, and the letter was designed to introduce him, and not to obtain credit for him. The court charged the jury for the plaintiffs that the intent of the letter was to be determined from its language, with the circumstances attending its transmission and delivery, and the business relations of the parties, and that the defendants were liable unless they had reasonable ground to believe its statements true, but refused to charge that the defendants were bound by

a reasonable construction of their letter, and if such construction induced the belief that it was intended to obtain credit for Kincannon, it was their duty to have communicated all the facts in their knowledge, and failure to do so was a fraud. For the defendants, the court instructed that the issue to be tried was not whether Kincannon complied with his agreement or whether he was solvent, but whether the statements in the defendants' letter were knowingly false, and made to procure credit for Kincannon; that if, at the time the letter was written, they honestly believed that the representations were true, and they were not made with a view to obtain credit for Kincannon, the defendants were not liable. There was a verdict and judgment for the defendants.

*Rives & Rives*, for the plaintiffs in error.

1. The court erred in its action on the evidence. The writer is bound by the intent expressed in his letter, and cannot be heard to testify that he meant something else. The representations must be construed as a reasonably prudent man in the situation of the recipient would interpret them. The testimony concerning Kincannon's reputation for truth was irrelevant. His character in that respect had not been attacked. Manifestly the defendants should not have been allowed to testify that they believed the statements of the letter to be true at the time it was written. A man will always say that he did not intend to deceive. The testimony should have been confined to their grounds of belief, for no one can honestly believe that which he has no reasonable ground to believe. *Sims v. Eiland*, ante, 88. The instructions contain similar errors. It is only by a reasonable construction of the letter that the defendants' intent can be gathered, and if that induced the belief that it was to obtain credit for Kincannon, they were liable for not communicating all they knew about him. *Allen v. Addington*, 7 Wend. 9. On all the evidence, the verdict should have been for the plaintiffs. Kincannon was insolvent when the letter was written, and if, by failure to make proper inquiry, his old friends, in their partiality for him, have induced these strangers to trust him, they should make good the loss. *Clopton v. Cozart*, 13 S. & M. 363. A wilful intention to deceive is not essential, but if the misrep-

resentation is made through carelessness, mistake or ignorance, the result is the same. Story on Contracts, § 506 and notes.

*John E. Madison*, on the same side.

*Jarnagin, Bogle & Jarnagin*, for the defendants in error.

It was proved that the defendants honestly believed that the representations were true. This was a sufficient answer to the declaration. *Sims v. Eiland*, ante, 83. The mere opinion expressed in the letter would not render them liable unless an intent to deceive is shown. *Clopton v. Cozart*, 13 S. & M. 363; *Taylor v. Frost*, 39 Miss. 328; *Pasley v. Freeman*, 2 Smith's Lead. Cas. 157. The onus does not rest on one who recommends another to prove the truth of his recommendation, but the law presumes him innocent until the contrary is shown. *Einstein v. Marshall*, 58 Ala. 153. There is no evidence tending to show that the statements of the letter were knowingly false, and actual fraud, or an intention to deceive, is disproved. The representations contained in the letter were honestly believed to be true in substance and fact, and were in fact true. In *Lord v. Goddard*, 13 How. 198, Catron, J., in delivering the opinion of the court, says: "The gist of the action is fraud in the defendants and damage to the plaintiffs. Fraud means an intention to deceive. If there was no such intention, if the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue." The court further say: "Since the decision in *Haycroft v. Creasy*, 2 East, 92, made in 1801, the question has been settled to this effect in England. The Supreme Court of New York held the same doctrine in *Young v. Covell*, 8 Johns. 23. That court declared it to be well settled that this action could not be sustained without proving actual fraud in the defendant, or an intention to deceive the plaintiff by false representations. The simple fact of making representations which turn out not to be true, unconnected with fraudulent design, is not sufficient. This decision was made forty years ago, and stands uncontradicted, so far as we know, in the American courts." See Bigelow on Fraud, 56, 57; Bigelow Lead. Cas. on Torts, 1-42; Cooley on Torts, 497. The errors of the lower court, if any were committed in the



rulings upon the evidence and the instructions, are immaterial, for the jury, under all the evidence adduced, could not have found otherwise than they did. This court has repeatedly decided that a new trial will not be granted in any case for error in giving or refusing a charge where the verdict is in accordance with the evidence, and clearly right according to the law and the justice of the case. *Perry v. Clarke*, 5 How. 495; *Brantley v. Carter*, 26 Miss. 282; *Simpson v. Bowdon*, 23 Miss. 524; *Cameron v. Watson*, 40 Miss. 191.

CAMPBELL, J., delivered the opinion of the court.

When this case was before us at the last term of this court, we announced that, "to maintain the action, the defendants must have made a false statement knowing it to be false." We adhere to that view of the law as applicable to an action for *deceit*, but to preclude any erroneous deduction from our former opinion, we now add, that a person who represents as a fact that of which he has no knowledge, and no well-founded belief, and which is false, is justly chargeable with having made a false statement knowingly; for to assert as fact that of which the party asserting has no knowledge, or well-founded belief, is knowingly to make a false statement if it is false. One has no right to mislead another to his hurt, by representing as within his knowledge what he knows nothing of. In recklessly making such representation which is not true, he is knowingly making a false representation, and must suffer the just consequences of his recklessness in misleading another to his injury. What one represents as true to another, to influence his action, must be true, or he must believe it to be true from facts and circumstances sufficient to induce a reasonable man to entertain such belief. If the person misled by the representations of another, which are false, can satisfy a jury that the person who made them did so recklessly, having no just ground for the belief of their truth, and for the purpose of inducing the action of the plaintiff, which resulted in loss, he should recover the loss incurred by trusting to the misrepresentations. Good faith is to be protected, while bad faith is to be punished. *Cooley on Torts*, 500, 501; *Einstein v. Marshall*, 58 Ala. 158. In this case, the evidence so fully

vindicates the good faith of the defendants in the transaction involved that a verdict against them could not stand; and, therefore, without noticing the rulings upon evidence and the instructions complained of, we affirm the judgment, overruling the motion for a new trial. *Judgment accordingly.*

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R. H. ALLEN v. N. E. STANDIFER ET AL.

1. AGRICULTURAL LIEN LAW. *Statement of claim. Waiver. Amendment.*

A defendant in a writ of seizure, under the agricultural lien law (Acts 1876, p. 109), who takes issue on the affidavit which sets out the plaintiff's claim, waives the filing of a statement thereof on the return day, and the court should, on affidavit of merits, allow the plaintiff to amend by filing such statement.

2. SAME. *Amendment. Erroneous denial.*

After the suit has been pending for two terms, upon the issue on the affidavit for the writ, it is erroneous to give judgment for the defendant when both sides are ready for trial, and the plaintiff tenders his statement and offers to continue the case at his costs.

APPEAL from the Circuit Court of Holmes County.

Hon. W. COTHRAN, Judge.

J. B. H. Hemingway, for the appellant.

The court erred in refusing leave to file the statement and in rendering judgment for want thereof. As the case had long been at issue on the affidavit for the writ of seizure, which set out the claim in full, no further statement was necessary. The only object in requiring a statement is to apprise the defendant of the nature of the claim, and when he took issue upon the affidavit, concluding to the country, he waived further notice. Both the agricultural lien law (Acts 1876, p. 113) and Code 1871, § 621, provide that amendments shall be liberally allowed, so as to bring the merits of the controversy fairly to trial. The statutes of amendments have been construed to allow the filing of a declaration or cause of action out of time. *Bloom v. McGrath*, 53 Miss. 249; *Duff v. Snider*, 54 Miss. 245. The right to plead out of time is recognized in

*McAdory v. Turner*, 56 Miss. 666. Similar decisions have been made under like statutes in other states. *Waterman v. Mattair*, 5 Fla. 211; *Wood v. Fobes*, 5 Cal. 62. It has been decided that a defendant in attachment, after pleading, cannot object that the plaintiff's declaration was not filed in time; and if such objection can be made, the court should allow the plaintiff to amend by filing his declaration, although out of time. *Ellison v. Gordon*, Harp. (S. C.) 436. A similar decision has been made in a case of replevin. *Amos v. Sinnott*, 4 Scamm. 440. Pleading to the action is a waiver of the objection of want of a declaration. *Wheeler v. Bullard*, 6 Porter, 352; *Arthur v. Broadnax*, 3 Ala. 557; *Oliver v. Hutto*, 5 Ala. 211; *Stanley v. Bank of Mobile*, 23 Ala. 652; *Donoghue v. Gardner*, 24 Ill. 565.

*J. W. Jenkins*, for the appellees.

The time had expired within which the appellant had a right to file the statement of his claim. Acts 1876, p. 113, § 9. Two terms had passed since the return day of the writ. *Vigilantibus non dormientibus. jura subveniunt*. This was not an application to amend under the tenth section of the act, but to file an original paper in the cause, and no excuse was offered for not filing it at the proper time.

CAMPBELL, J., delivered the opinion of the court.

The refusal of the court to permit the plaintiff to file a statement of the claim, when the motion was made by the defendants for judgment, because the plaintiff had failed to file a written statement of his claim, was based on the language of the ninth section of "An Act to provide for Agricultural Liens and for other purposes," approved April 14, 1876 (Acts 1876, p. 109), under which this proceeding was had. That language is, "That on or before the return day of such writ in the Circuit Court, the plaintiff shall file with the papers in such cause a statement setting forth in full his claim, and the defendant or defendants making any defence or claim shall in like manner file a statement of his or their defence or claim, when such suit shall be considered at issue." The next section directs that the court "shall allow all amendments of the proceedings necessary to a full development and settlement of the rights of the different parties."

In this case, the claim of the plaintiff was set forth quite fully in his affidavit, made to obtain the writ of seizure; and the defendants had responded to the affidavit, at the return term of the writ, by filing their statement of their defence, which concludes in these words, viz.: "and of this they put themselves on the country," and is signed by the attorney of the defendants. From this, it is manifest that all parties considered the issue as made up and ready for trial. The case was continued for two terms of the court, and at the third term, the attorney for the plaintiff having concluded that a "statement" of his claim was necessary, prepared it and put it among the papers, whereupon the attorney for the defendants moved for judgment, because a statement of the claim of the plaintiff had not been filed on or before the return day of the writ; and the plaintiff moved for leave to file the statement *nunc pro tunc*, and accompanied his motion with an affidavit of merits, and an offer to continue the case at his costs, and with evidence that the witnesses on both sides were present, and that both sides had considered the case at issue, and were then ready for trial. The court denied the motion of the plaintiff, and granted the motion of the defendants for judgment.

This was clearly erroneous. It was following the letter, in disregard of the spirit of the statute, and in forgetfulness of the important truth that "the letter killeth, but the spirit giveth life." The spirit of modern and enlightened jurisprudence is to administer justice. Regard is had for matters of substance rather than form in judicial proceedings. Courts are now regarded as existing for the enforcement of rights and the redress of wrongs, and not as places for the exhibition of professional cunning and judicial smartness in discerning finely drawn distinctions between the proper commencement and conclusion of pleadings, and cases of express and implied color, and special traverses and the like subtleties, which in the past constituted so large a part of the boasted common law.

The amendment should have been allowed. It would have done no harm. It operated no surprise to the defendants. They had responded to the affidavit of the plaintiff and concluded to the country, thus treating the issue as formed. A statement of the plaintiff's claim was necessary, because required

by the statute; but it was competent for the defendants to waive compliance with this requirement, and they had virtually done this by answering the affidavit and appealing to the country. The learned circuit judge doubtless felt bound by the language of the statute to deny leave to file the statement of the plaintiff's claim after the return day of the writ. In this he was mistaken. He had the right to consider the situation, and to order all amendments necessary to bring the merits of the controversy between the parties fairly to trial, and it was his duty to permit the filing of the statement of the plaintiff's claim.

*Judgment reversed and cause remanded.*

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VICTOR MEYER ET AL. v. JOHN CASEY.

1. CONTRACT. *Failure of consideration.*

The rule which excludes parol evidence tending to contradict a written instrument, is inapplicable to evidence of failure of consideration.

2. SAME. *Sealed instrument. Impeaching consideration by parol.*

The distinction between sealed and unsealed instruments, as to the right to impeach the consideration, does not exist in this State.

ERROR to the Circuit Court of Washington County.

Hon. B. F. TRIMBLE, Judge.

The plaintiffs in error, under their firm name of Meyer, Weis & Co., brought this action of replevin against the defendant in error and Jacob Ostroffsky. Twenty bales of cotton, seized by the sheriff, were retained by Casey, who claimed them. After the plaintiffs had introduced at the trial a bill of sale executed to them by Ostroffsky and Casey, conveying all the cotton on the plantation, which the latter jointly owned, estimated at one hundred bales, and proved that only eighty bales had been delivered, Casey, notwithstanding the fact that the consideration recited in the bill of sale, which was under seal, was advances made to Casey and Ostroffsky by Meyer, Weis & Co., offered to prove that he was not

indebted to the plaintiffs, but that the consideration upon which he signed the bill of sale was an agreement upon their part to pay a balance of the purchase-money due for the plantation, and that they had failed to make the payment. The plaintiffs objected to the evidence upon the ground that it varied the written contract, but the court overruled the objection, and admitted the evidence, because it tended to show the true consideration of the bill of sale. The plaintiffs reserved an exception, and there was a verdict and judgment for the defendant, Casey.

*Percy & Yerger*, for the plaintiffs in error.

The sale was complete, the title in the plaintiffs, and the property at their risk, and the defendants were entitled to a credit on their indebtedness to its full value, and the plaintiffs to the cotton. *Bowers v. Andrews*, 52 Miss. 596; *Benjamin on Sales*, 265. After the contract of sale was reduced to writing, all oral altercations between the parties prior to its execution were inadmissible. *Herndon v. Henderson*, 41 Miss. 584; *Kerr v. Kuykendall*, 44 Miss. 137; *Shackelford v. Hooker*, 54 Miss. 716. Casey's evidence added a distinct stipulation to the contract. It would have been inadmissible even to show that the bill of sale was intended merely as a security, if this could only be done by parol evidence. *Blake v. Morrison*, 33 Miss. 123; 1 Greenl. Evid. § 275.

*Frank Johnston*, for the defendant in error.

This is not an attempt to vary a written contract by parol evidence, but to show a failure of consideration. The authorities cited by opposing counsel are not in point. The practical question is whether the plaintiffs can get Casey's property for nothing by the mere force of a recital in the conveyance. Want of consideration may be shown, where a promissory note states that it is for value, or recites a consideration. *Stackpole v. Arnold*, 11 Mass. 27; *Amherst Academy v. Cows*, 6 Pick. 427. The consideration of a contract may be proved in order to show its partial failure. *Folsom v. Mussey*, 8 Greenl. 400. Parol evidence is always admissible to impeach the consideration. *Wolf v. Fletemeyer*, 83 Ill. 418; *Great Western Ins. Co. v. Rees*, 29 Ill. 272. It has been allowed to be shown that the recital in a written contract of a money

consideration was not in fact true, but that the real consideration was the delivery of iron. In the case of *Bolles v. Beach*, 22 N. J. 680, parol evidence was admitted to contradict the recital of the consideration of a deed. *Rockhill v. Spraggs*, 9 Ind. 30, holds the doctrine that even where one consideration, and no other, is expressed in a deed, parol evidence is admissible to prove a different consideration, though the legal effect of the instrument is thereby changed. In *Schillinger v. McCann*, 6 Greenl. 364, parol evidence was allowed to contradict a recital of payment, and to show that part of the price had in fact been left in the grantee's hands, to be applied to a special purpose. And generally it is held that, wherever there has been a want or failure of consideration, parol evidence is admissible. *Erwin v. Saunders*, 1 Cowen, 249; 1 Greenl. Evid. § 284.

CAMPBELL, J., delivered the opinion of the court.

The consideration of the bill of sale of the cotton wholly failed as to Casey. The written instrument recites a consideration, and it is claimed that it is not allowable to contradict the writing in this respect. The rule of exclusion does not apply to evidence of failure of consideration. It is not admissible to vary by parol the terms of a valid written instrument. If it has a valid existence, it must stand as the sole expositor of the terms of the contract it evidences; but it is allowable to show by parol that the writing never had validity, or, that having had a legal existence, it has for some reason ceased to be operative. The distinction between sealed and unsealed instruments, as to the right to impeach the consideration, does not exist in this State.

*Judgment affirmed.*

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### HAL GREEN v. MOSE BOON.

**AFFIDAVIT FOR APPEAL.** *Failure to date and sign. Amendment.*

A justice of the peace, who has neglected to date and sign an affidavit for an appeal, should be permitted to affix the date and signature in the Circuit Court on motion to dismiss.

ERROR to the Circuit Court of Chickasaw County.

Hon. J. A. GREEN, Judge.

Pending the motion, which the Circuit Court sustained, to dismiss the appeal of the plaintiff in error, he offered to introduce the magistrate to amend the affidavit for appeal, in accordance with the facts, by affixing the date and his signature.

*A. Y. Harper*, for the plaintiff in error.

The officer's negligence should not affect the rights of a person who did not contribute thereto, but did all in his power to perfect the appeal.

*Lacey & Baskin*, for the defendant in error.

The absence of the magistrate's signature and the date renders the affidavit void, and incapable of amendment. Acts 1876, p. 114, § 13; Code 1871, §§ 1332, 1333; *Saunders v. Erwin*, 2 How. 732; *Redus v. Wofford*, 4 S. & M. 579; *Brooks v. Snead*, 50 Miss. 416.

CAMPBELL, J., delivered the opinion of the court.

The Circuit Court should have permitted the amendment of the affidavit for the appeal, and, for refusing it, the judgment is

*Reversed and cause remanded.*



BOARD OF SUPERVISORS OF LEAKE COUNTY *v.* J. L. MCFADDEN.

1. FERRY. *Franchise. Prescription.*

The owner of both banks of a river, who has for thirty years kept a ferry without license from the board of supervisors of the county, has by prescription the absolute property in the franchise.

2. SAME. *Eminent domain. Board of supervisors.*

The right of eminent domain, by virtue whereof the State may appropriate the franchise to the public use on due compensation, cannot, in the absence of legislative grant, be exercised by the board of supervisors.

3. SAME. *Power of board of supervisors. Roads, bridges and causeways.*

The franchise is not the kind of property which the board of super-



visors can condemn under the statute authorizing the appropriation of land for public roads, and timber for bridges and causeways.

4. SAME. *Jurisdiction of the board. Free ferries.*

Under the statutory grant of power over ferries, the board of supervisors may license and regulate ferries kept by other persons, but cannot establish a free ferry at the expense of the county.

5. SAME. *Injunction.*

The owner of the ferry is entitled to a perpetual injunction by a court of chancery against the execution of the orders of the board of supervisors appropriating his franchise and establishing the free ferry.

ERROR to the Chancery Court of Leake County.

Hon. T. B. GRAHAM, Chancellor.

*G. M. C. Davis*, for the plaintiff in error.

The proceedings of the board of supervisors in the establishment of roads, ferries, and bridges, are judicial in their nature, and stand until reversed. *Yalobusha County v. Carby*, 3 S. & M. 529; *Carroll v. Board of Police*, 28 Miss. 38. Suing out the injunction is a waiver of all errors. Code 1871, § 1047; *Bustamente v. Bescher*, 43 Miss. 172. The defendant in error has no franchise by prescription. Under the English law it may originate in that way, but in America it can be created only by a grant from the government. *Burrill's Law Dic.*, title Franchise. In law, it is as though no ferry existed. The fact that the defendant in error owns both banks of the river confers upon him no right to the ferry. The board of supervisors has power to establish a free ferry at the county expense. By the State Constitution, art. 6, § 20, a distinction is drawn between the power of the board over roads, ferries, bridges and elections, and its "other duties." The former is given by the Constitution to which we look for the authority; the latter is conferred by statute. The power over ferries can be exercised without regard to the statute, and embraces their establishment as well as regulation, and free public ferries as well as private ones. The statutes, however, confer full powers. Code 1871, §§ 1363, 1369, 2339, 2344, 2379; *Allgood v. Hill*, 54 Miss. 666. It is inconceivable that the defendant should have acquired by legislative action or inaction the power to obstruct the passage of a river although resulting

in inconvenience to the public, and a restriction of the powers of the board of supervisors.

*Raymond Reid*, for the defendant in error.

The orders of the board of supervisors were beyond its powers. They were an attempted exercise of the power of eminent domain which resides in the State, and can be exercised by no tribunal unauthorized by the legislature. *Mills on Eminent Domain*, 2. They are the appropriation of the defendant's franchise, acquired by prescription. No law confers this power upon the board in connection with ferries. Const., art. 6, § 20, does not, for it is held in *Allgood v. Hill*, 54 Miss. 666, that this section confers jurisdiction on the board in the same manner that the sixteenth section of the same article confers it upon Chancery Courts. The power is not granted by Code 1871, § 2379, which merely enables the board to give legal authority to the ferry, as the king did in England at common law; and, as an attempt to confer the power of eminent domain, the statute, failing to provide for compensation, is unconstitutional. *Pearson v. Johnson*, 54 Miss. 259. The statute (Code 1871, §§ 2339, 2377) which authorizes the taking of certain kinds of property in certain cases, is not applicable to this case. The power of eminent domain will not be considered as delegated, unless expressly conferred. *Mills on Eminent Domain*, 48, 95, 96, 105; *Sykes v. Mayor*, 55 Miss. 115. The board cannot establish the ferry at the public expense. No claim can be paid out of the county treasury when there is no law for it. To prevent this continuing trespass, an injunction was the appropriate remedy. 2 Story Eq. Jur. §§ 862, 927, 955; High on Injunctions, §§ 761, 770, 794, 801; *Penrice v. Wallis*, 87 Miss. 172.

GEORGE, C. J., delivered the opinion of the court.

The board of supervisors of Leake County, made certain orders for the establishment at the expense of the county of a ferry over Pearl River, free to all the citizens of that county. These orders directed the appropriation for this free ferry of a ferry franchise, owned by the defendant in error, and for that purpose directed the sheriff of the county to summon an inquest to assess the damages which

the defendant in error might sustain by reason of the appropriation of his property by the county. The defendant in error sued out an injunction against the execution of these orders of the board of supervisors, which, on final hearing, was made perpetual by the Chancellor. It appeared at the trial that the defendant in error was the owner of both banks of the river, and that he had held and used the franchise of a public ferry for thirty years; that the public road leading to his ferry, on both sides of the river, had been established thirty years; and that the proposition of the board of supervisors was to establish a free ferry on the precise spot occupied by his ferry.

We think the Chancellor did right in enjoining the establishment of a free ferry. The defendant in error had enjoyed the franchise of keeping a ferry for thirty years, as his property, without license from the board of supervisors. His franchise had thus become by prescription his absolute property, of which he could not be deprived except by due course of law. It is true that it is within the right of eminent domain residing in the State to appropriate this franchise to the public use by paying the defendant in error the value thereof, but the power to exercise the right has not been granted by the legislature to the board of supervisors. The board may order the appropriation of land for public roads, and also timber for building or repairing bridges and causeways, but this franchise of the defendant in error is not land or timber, and hence is not within the statute authorizing the appropriation of these kinds of property. The right of the board to appropriate the franchise is defective on another ground. There is no statute authorizing the board of supervisors to use the money of the county to establish a free ferry. The power granted by the statute to the board of supervisors over ferries is to license and regulate ferries kept by other persons, not to establish them at the expense of the county.

*Decree affirmed.*

## CHARLES J. OSBORNE ET AL. v. JOHN W. CRUMP.

1. CHANCERY PLEADING. *Answer. New matter. Burden of proof.*

The burden of proving new affirmative matter, set up in the answer and not responsive to the allegations of the bill, is upon the respondent.

2. PARTIES IN CHANCERY. *Trustee who has conveyed title.*

A trustee, who has sold, is not a necessary party to a bill against the purchaser to whom he has conveyed, filed by the first vendor to subject the land to a lien for an unpaid balance of the original purchase money, which was secured by the deed of trust.

3. SAME. *Purchaser pendente lite.*

A purchaser of land, during the pendency of a chancery suit involving the title thereto, is bound by the decree, though not made a party.

4. SAME. *Mortgagor who has parted with the property.*

A mortgagor, who has parted with the mortgaged property, is not a necessary party to a bill to foreclose, if no personal decree is sought against him.

## APPEAL from the Chancery Court of Bolivar County.

Hon. W. G. PHELPS, Chancellor.

*T. J. & F. A. R. Wharton*, for the appellants.

1. The answers, which are sworn to, contradict the theory and allegations of the unsworn bill. The ground for relief stated in the bill is fraud, and it was incumbent on the complainant to prove that charge before the defendants were required to offer any evidence. *Fulton v. Woodman*, 54 Miss. 158. As to the answers setting up affirmative matter not responsive to the bill, and the disregarding of such matter because no proof was offered to support them, we reply that when a cause is brought to a hearing on bill and answer, the answer is to be taken as true in all points. *Brinckerhoff v. Brown*, 7 John. Ch. 217. If a cause in chancery is set down for hearing without proof, the answer denying all the material facts alleged in the bill, it should be dismissed. So, it should be dismissed, if the answer sets up sufficient matter of defence, consisting of distinct facts by way of avoidance to the bill. To escape this consequence, the complainant should reply, and give the defendant an opportunity to prove his answer. *Atkinson v. Manks*, 1 Cowen, 691.

2. Before proceeding to final hearing, on the filing of the answers, showing a sale to Rockwell, the court should have ordered him to be made a party, as the legal title was shown to be in him. Story Eq. Pl. § 72. Whenever it is discovered that other persons, not parties, are interested in the suit, they should be made parties, however numerous they may be. *Carman v. Watson*, 1 How. 383; *Coulson v. Harris*, 43 Miss. 728, 753; *Marshall v. Beverley*, 5 Wheat. 313; *De La Vergne v. Evertson*, 1 Paige, 181. This is to enable the court to make a complete decree between the parties, to prevent multiplicity of suits, and to avoid injustice either to the parties before the court or to the interests of others, by a decree that may be grounded upon a partial view of the merits. The rule and only relaxation of it are laid down in *McPike v. Wells*, 54 Miss. 136; *West v. Randall*, 2 Mason, 181; *Wormley v. Wormley*, 8 Wheat. 421, 451, note; Story Eq. Pl. § 72; Cooper Eq. Pl. 33; Calvert on Parties, ch. 2, § 4, pp. 113, 116; 1 Dan. Ch. Pr. ch. 5, § 3, pp. 384, 388. Taking the rule in its restricted sense, as "confined to the parties to the interest involved in the issue, and who must necessarily be affected by the decree," and its application in this case, as shown by the answers of Trowbridge and Osborne, it is apparent that the representatives of the former, and Rockwell, to say nothing of the trustee, should have been made parties. Admitting that it is a rule of convenience merely, it is only dispensed with when it becomes extremely difficult or inconvenient. None of those difficulties or inconveniences exist in the case at bar. There was no difficulty in filing a bill of revivor, making the representatives of Trowbridge parties, nor in making Rockwell or the trustee parties. The court has undertaken by its final decree to declare that the assignment of the deed of trust to Osborne is void, because procured by fraudulent misrepresentations, and that his purchase at the sale under the deed of trust and his sale and conveyance to Rockwell are also void. If all that is true, then the legal title is still in the trustee; and he is an indispensable party. The objection, for want of parties, can be allowed in the Supreme Court, if made there for the first time. *Marshall v. Beverley*, 5 Wheat. 313;

1 Story Eq. Pl. §§ 75, 207 ; Calvert on Parties, 3, 11; 1 Dan. Ch. Pr. 388.

*T. J. Wharton*, on the same side, made an oral argument.

*F. A. Montgomery*, on the same side.

*L. Brame*, for the appellee, argued orally and in writing.

1. The allegations of the answers, upon which the defendants relied in asking a decree, are not responsive to the bill, but present new affirmative matter in avoidance. The decree was based on the statements which are admitted in the answers, that the consideration of the contract failed, and that the complainant retained his lien. *Kausler v. Ford*, 47 Miss. 289. An answer in chancery is evidence only in so far as it is responsive to the allegations of the bill. New matter in avoidance must be established by proof. *Brooks v. Gillia*, 12 S. & M. 538; *Dease v. Moody*, 31 Miss. 617; *Miller v. Lamar*, 43 Miss. 383; *Rodd v. Durbridge*, 53 Miss. 694; *Fulton v. Woodman*, 54 Miss. 158. The complainant was not called upon to prove the facts in his bill that were admitted; nor was it incumbent upon him to take proof of the other facts before the defendants offered any testimony to sustain their charges. If the complainant had set the cause down for hearing before the expiration of the time allowed for taking testimony, he would have admitted the truth of the facts stated in the answers. But this was not done. The fact that the bill was not sworn to is immaterial in this case. The complainant was not called upon to meet any thing but the allegations in the answers. The defendants could not have proved a case not made by their pleadings. *Armstrong v. Stovall*, 26 Miss. 275; *Bowman v. O'Reilly*, 31 Miss. 261; *Bacon v. Ventress*, 32 Miss. 158; *Baygents v. Beard*, 41 Miss. 531. The defendants would not have been entitled to a decree if they had taken testimony and established every allegation in the answers.

2. As Trowbridge had no interest in the land at his death, none descended to his heirs, and it was unnecessary to make them parties. The doctrine of *McPike v. Wells*, 54 Miss. 136, does not apply. The record shows that Trowbridge had no interest in the land; no decree *in personam* was asked

against him, and, when the defendant, Osborne, suggested his death, the case was dismissed as to him. The dismissal of the case as to Trowbridge was not error. *Simpson v. McGlathery*, 52 Miss. 723. The decree is not against Trowbridge *in personam*. He had conveyed away the land, as is admitted. He was not interested. Story Eq. Pl. §§ 76, 140, 153, 175, 236, and notes; *Swift v. Edson*, 5 Conn. 581; *Shaw v. Hoadley*, 8 Blackf. 165. If the court can decide between the litigants before it and do justice, it will go on to final decree. *Elmendorf v. Taylor*, 10 Wheat. 152. The mortgagor, after he has conveyed away the whole of the premises mortgaged, is not a necessary party to the suit; nor, indeed, is he a proper party, unless a personal judgment for any deficiency there may be after applying the property to the debt is sought against him. The decree is conclusive as to the title without him. Jones on Mortgages, §§ 1404, 1407; *Soule v. Albee*, 81 Vt. 142; *Drury v. Clark*, 16 How. Pr. 424; *Daly v. Burchell*, 18 Abb. Pr. n.s. 264; *Stevens v. Campbell*, 21 Ind. 471; *Johnson v. Monell*, 18 Iowa, 800; *Belloc v. Rogers*, 9 Cal. 123; *Delaplaine v. Lewis*, 19 Wis. 476; *Cord v. Hirsch*, 17 Wis. 403; *Medley v. Elliott*, 62 Ill. 582. It is not claimed that the sale of the land by the trustee, was void. It was a valid sale, and conveyed the entire title, subject to the equity of Crump. The trustee was also divested of the title by his sale, and hence he was not a necessary party. *Mitchell v. Mitchell*, 85 Miss. 108; *Green v. Gaston*, 56 Miss. 748. Any reason to obviate such purely technical objections should be adopted. It is insisted that Rockwell should have been made a party. The well-established rule of chancery practice, requiring all parties in interest to be joined, is not disputed; but Rockwell was a purchaser *pendente lite*, and, therefore, was not a necessary party. He purchased after bill filed, citation issued, and publication made and mailed to the defendants. If persons purchasing property pending the suit are necessary parties, the court could never make a decree, if those before the court were disposed to prevent it. Story Eq. Pl. § 156; Jones on Mortgages, § 1411. None of these questions were raised in the court below, and this court, which has no jurisdiction over new points, cannot consider them.



CHALMERS, J., delivered the opinion of the court.

The case was submitted without proof, and must be decided on the pleadings, which show the following state of facts. Crump sold a plantation in Bolivar County to one Smith for fifteen thousand dollars, of which amount nine thousand dollars were paid in cash, the note of the purchaser being taken for six thousand dollars. Crump executed to Smith a deed of the land, and received back from him a trust-deed to protect the note. Smith afterwards sold the land to one Looney, who, in turn, sold to Trowbridge, deeds being executed in each case. Crump, pressing Trowbridge for the money due him on the land, the latter paid to him the sum of three thousand two hundred dollars, which he had borrowed for that purpose from his son-in-law, Osborne, and executed his own note for two thousand three hundred and fifty dollars for the balance due. At Trowbridge's request, Crump transferred and assigned the trust-deed to Osborne, and received from Trowbridge in lieu of it the assignment of a mortgage, held and owned by the latter, on a tract of land in New Jersey, being induced to do this by the assurances of Trowbridge that the New Jersey mortgage was worth far more than the twenty-three hundred and fifty dollars due, and that it afforded a perfect security for it. Crump knew nothing of the New Jersey mortgage, and relied wholly on Trowbridge's statements in accepting it. It proved to be wholly worthless; and, in the mean time, Osborne foreclosed the trust-deed on the plantation in Bolivar County, which was transferred to him by Crump, and became the purchaser at the sale made thereunder. Crump brings this bill to assert against the Bolivar lands a lien for the balance of the original purchase-money, now represented by Trowbridge's note for two thousand three hundred and fifty dollars. That he is entitled to the relief prayed, under the facts stated, is not seriously denied; but it is contended that the decree in his favor was improperly rendered, because no testimony had been taken, and the burden of proving the case rested upon the complainant. The facts, as above set forth, were admitted by the answers of Trowbridge and Osborne, and of themselves entitled the complainant to a decree. Trowbridge, in his answer, sought to avoid them by the



avermment that, after the New Jersey mortgage was discovered to be worthless, a fact unknown to him at the time he assigned it, he transferred other securities in lieu of it to Crump, with which the latter avowed himself satisfied, and which he still held. Manifestly, this was new affirmative matter, not responsive to any thing in the bill, and the burden of proving it devolved upon the defendants; but, though more than a year intervened between the filing of the answers and the final hearing, no depositions were taken in support of it.

No objection for want of parties was taken in the lower court; but it is urged here that there is such absence of essential parties that it is impossible to render a decree that will do justice, and that therefore, of our own motion, we must reverse. It is said that Montgomery, the trustee in the trust-deed executed by Smith to Crump, should have been made a party. The point is not well taken, because it is shown both by the bill and answers that he had fully executed his trust and divested himself of title by the sale made before the institution of the suit, at which Osborne became the purchaser of the land. Osborne stated in his answer that he had sold the land to one Rockwell, and it is said that the latter is a necessary party. But it is shown by the answer that he bought *pendente lite*, and such a purchaser is bound by the decree without being a party.

Trowbridge died after the answers were filed, and the cause was dismissed as to him. It is said that it should have been revived against his heirs and personal representatives. This was not essential, because Trowbridge himself, although a proper, was not a necessary party. In his answer he disclaimed all interest in the land, and no personal decree was asked or rendered against him. He stood in the relation of a mortgagor of the land, having accepted the obligation to pay off the mortgage executed by Smith; and it is well settled that a mortgagor who has parted with the mortgaged property is not a necessary party to a bill to foreclose, where no decree *in personam* is sought against him. Story Eq. Pl. § 197; 2 Jones on Mortgages, § 1404, and authorities cited.

*Decree affirmed.*

## G. W. HUTCHINSON, GUARDIAN, ET AL. v. L. SIMON ET AL.

PARTIAL ASSIGNMENT. *Enforceable in equity, but not at law.*

A written assignment of an interest in a note is not enforceable at law against the debtor without his express assent and assumption; but the assignee can maintain a bill in equity.

APPEAL from the Chancery Court of Warren County.

Hon. UPTON M. YOUNG, Chancellor.

*R. S. Buck*, for the appellants.

A creditor cannot by assignments cut up his claim and multiply obligations against his debtor, not contemplated by his original contract, without his consent. *Mandeville v. Welch*, 5 Wheat. 277; *Gibson v. Cooke*, 20 Pick. 15; Drake on Attachment, § 611, and note 1; *Burnett v. Crandell*, 63 Mo. 410; *Getchell v. Maney*, 69 Maine, 442. The reasoning upon which the principle is based in the cases cited is as applicable in equity as at law, and the doctrine has found recognition in courts possessing chancery powers. *Gibson v. Finley*, 4 Md. Ch. 75; *Collyer v. Fallon*, Turn. & Russ. 459. In *Fairgrievies v. Lehigh Navigation Co.*, 5 Am. Law Reg. o. s. 161, it was held that a partial assignment to which the debtor did not assent would not bind him at law or in equity.

*Shelton & Crutcher*, for the appellees.

A partial assignment of a debt is enforceable in equity without acceptance by the debtor. *Smith v. Everett*, 4 Bro. Ch. 64; *Lett v. Morris*, 4 Sim. 607; *Morton v. Naylor*, 1 Hill, 583; *Watson v. Duke of Wellington*, 1 Russ. & Myl. 602; 2 Story Eq. Jur. § 1044. The case of *Field v. Mayor of New York*, 2 Seld. 179, is directly in point, and conclusive. Lord Eldon in *Ex parte Smyth*, 1 Swanst. 338, said that the course of the decisions at law, on this subject, is not the doctrine of the Chancery Court. To the same effect are other cases in England and in this country. *Walker v. Seigel*, 2 Cent. Law Jur. 508; *Yeates v. Groves*, 1 Ves. Jr. 280; *Stanbery v. Smythe*, 13 Ohio St. 495; *Richardson v. Rust*, 9 Paige, 243. This court has also recognized the validity of partial assignments. *Fitch v. Stamps*, 6 How. 487; *Moody v. Kyle*, 34

Miss. 506; *Richardson v. Lightcap*, 52 Miss. 508. The case at bar comes within the rule laid down by the Supreme Court of the United States in *Christmas v. Russell*, 14 Wall. 69. Authority is not wanting for the proposition that a partial assignment is enforceable even at law. *Buckner v. Sayre*, 18 B. Mon. 745; *Lester v. Given*, 8 Bush, 357.

CHALMERS, J., delivered the opinion of the court.

By the allegations of the bill which is demurred to, it appears that Mrs. Lowenhaupt, now a lunatic represented by G. W. Hutchinson, her guardian, held a note for four thousand dollars made by Louis Hoffman, secured by mortgage. For value received she assigned in writing an interest in this note and mortgage, to the extent of fifteen hundred dollars, to H. H. Miller as agent and attorney for the appellees, Levi Simon & Co. This instrument of assignment was at once exhibited to and read by the debtor, Hoffman, who nevertheless thereafter, in fraud of the appellees' rights, paid to Mrs. Lowenhaupt, or to her guardian, the full amount of the four thousand dollar note, and procured an entry of satisfaction of the mortgage by which it was protected. The prayer is for a personal decree against Mrs. Lowenhaupt and Hoffman for fifteen hundred dollars with interest, and for a re-instatement and foreclosure of the mortgage to that extent. The demurrer is based upon the theory that the assignment of a portion only of a particular debt or fund is invalid and not enforceable against the debtor without an express assent and assumption on his part.

Such is undoubtedly the rule in courts of law, for the sufficient reason that it would subject the debtor to a multiplicity of suits at the instance of each assignee of separate portions of the debt; and, as the original creditor would be no party to those suits and might thereafter, upon a suit brought by himself for the whole debt, deny the assignments, it would be impossible in a court of law to protect the rights of all the parties. This reason does not apply to courts of equity, and the law ceases with the reason upon which it is founded. It is quite generally, though not universally, held that such assignments are good in equity, and may be there enforced. Such, cer-

tainly, has been intimated or assumed to be the law in this State in several cases, and such also seems to be the view entertained by the Supreme Court of the United States. We are satisfied of its correctness. *Moody v. Kyle*, 34 Miss. 506; *Fitch v. Stamps*, 6 How. 487; *Richardson v. Lightcap*, 52 Miss. 508; *Christmas v. Russell*, 14 Wall. 69; 2 Story Eq. Jur. § 1044.

*Decree overruling demurrer affirmed.*

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### NAPOLÉON BUTLER v. THE STATE.

#### CRIMINAL PROCEDURE. *Special judge.*

The statutory provision (Code 1871, § 536) for the selection by lot of a special judge from among the members of the bar, when the circuit judge is disqualified, is inapplicable to criminal cases.

#### ERROR to the Circuit Court of Hinds County.

Hon. S. S. CALHOON, Judge, did not preside in this case, but W. C. WELLS acted as Judge *pro hac vice*.

Upon the trial of this indictment for assault with intent to commit murder, at which the plaintiff in error was convicted, the judge of the court being disqualified, and unable to procure the service of another judge by interchange, announced his purpose to appoint by lot, in the manner provided by the statute, a member of the bar to act as judge. The defendant objected; his objection was overruled and he excepted.

*M. Dabney*, for the plaintiff in error.

The statute providing for the selection of a special judge, where the judge of the court is disqualified (Code 1871, § 536), does not apply to criminal cases. *Peter v. State*, 6 How. 326. The Act of 1840, relating to Chancery Courts, and that of Feb. 5, 1841 (1841, p. 217), which extends it to Circuit Courts, are more general in their language than the Code of 1871. Manifestly, if the statutes embraced criminal cases, they would be unconstitutional. The clause of the statute, providing for the selection of a lawyer by lot, is not intended

to cover prosecutions for crime. The trial in this case was, therefore a nullity. *Wright v. Boon*, 2 G. Greene, 458; *Smith v. Frisbie*, 7 Iowa, 486.

*T. C. Catchings*, Attorney General, for the State.

An inspection of the act of 1840 (Hutch. Code, 772) shows that the case of *Peter v. State*, 6 How. 326, is not in point. The difference between that act and Code 1871, § 536, is so great as to remove the latter beyond the reach of that decision. The fourth article of chapter eight of the Code relates to the circuit judge, and there is nothing in § 536 to indicate that it should be restricted to civil cases. It was intended to apply in criminal and civil cases alike. The ruling of the circuit judge was right. As to the constitutionality of the statute, see *Grinstead v. Buckley*, 32 Miss. 148.

CHALMERS, J., delivered the opinion of the court.

We think that Code 1871, § 536, which provides for the selection of a special judge by lot from among the members of the bar when the circuit judge is disqualified, was not intended to apply to criminal cases. It speaks of the judge being incompetent "in any cause" in his court and of "the parties litigating in such cause." If this language is broad enough to embrace criminal prosecutions, it is hardly fit language for the purpose. It seems more probable that the High Court of Errors and Appeals having, in the case of *Peter v. State*, 6 How. 326, intimated that such a statute would be unconstitutional if applied to criminal prosecutions, the legislature designed to apply it to civil cases only. We are not to be understood as expressing any opinion upon the legislative power to enact such a provision with regard to criminal cases, but only as declaring that the present statute does not embrace them.

*Reversed and remanded.*

## L. KIMBALL ET AL. v. C. B. MITCHELL ET AL.

1. BILL OF EXCEPTIONS. *Recital of signing. Effect thereof.*

A bill of exceptions, which states that it was signed during the term at which the action objected to took place, cannot, in the absence of fraud, be successfully assailed upon the ground that in fact it was signed in vacation.

2. SAME. *Fraud. Signing in vacation. Consent.*

The mere fact that the bill of exceptions is signed in vacation does not show fraud, if it also appears that it is so signed with the consent of the parties.

3. SAME. *Made of record by judge's signature. Filing.*

It is unnecessary for a bill of exceptions to be marked filed by the clerk in order to be made a part of the record, but it becomes such by the signature of the judge.

ERROR to the Circuit Court of Chickasaw County.

Hon. J. A. GREEN, Judge.

The defendants in error, after the transcript was filed in this court, moved to affirm the judgment of the court below, on the ground that there was no valid bill of exceptions in the record.

*A. H. Handy*, for the motion, made an oral argument, and cited *Vicksburg Railroad Co. v. Ragsdale*, 51 Miss. 447, and *Rankin Savings Bank v. Johnson*, 56 Miss. 125.

*Frank Johnston*, *contra*, argued orally, and in writing, that the bill of exceptions, which is a record, shows on its face that it was signed in term-time, and cannot be contradicted except for fraud; and that no fraud is shown in this case.

GEORGE, C. J., delivered the opinion of the court.

The motion is to affirm the judgment, because all the assignments of error are predicated on the bill of exceptions contained in the record, upon the ground that this bill of exceptions is no part of the record, because, as is alleged, it was signed by the judge after the adjournment of the court, and there was no order of court allowing the bill to be prepared and signed after the term, and no statement in the bill itself that this course was consented to by the parties. The bill of exceptions was taken to the overruling of a motion for

a new trial, and appears on its face to have been taken at the instant of the overruling of the motion, and during the term, though it appears to have been marked filed by the clerk several months afterwards. The statement in the bill of exceptions, as to the time of its being signed, is conclusive, like all other parts of the record, and can only be impeached for fraud. Merely showing that it was in fact signed afterwards would not show the fraud if it also appeared that it was so signed with the consent of the parties, which is the case here. It is not necessary that the bill of exceptions should be marked filed in order to make it a part of the record. It becomes such by the signature of the judge.

*Motion denied.*

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JOHN F. WILLIAMS ET AL. v. TISHOMINGO SAVINGS INSTITUTION.

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877	890

**BILL OF EXCHANGE.** *Indorser's liability.*

The indorser of a bill of exchange warrants his title; and, if the indorsement by which he holds is a forgery, his indorsee can recover back the money paid him for the bill.

**APPEAL** from the Circuit Court of Alcorn County.

Hon. J. A. GREEN, Judge.

*Inge & Chandler*, for the appellants.

The payment of the bill of exchange by the drawee was a complete discharge of the indorsers, whose contract was only to pay if the drawee did not; and the loss must fall on the drawee, unless the money can be collected from the forger. *Oakey v. Wilcox*, 8 How. 330; *Lapiece v. Hughes*, 24 Miss. 69; *Baskerville v. Harris*, 41 Miss. 535.

*Whitfield & Young*, for the appellee.

An indorsement is a contract by the indorser, and every subsequent holder, that the instrument and the antecedent signatures thereon are genuine, and that the indorser has a good title to the instrument. Story on Promissory Notes, § 135; 2 Parsons on Notes and Bills, 588, 589, 591; *National Bank v.*

*Bangs*, 106 Mass. 441 ; *National Park Bank v. Ninth National Bank*, 46 N. Y. 77 ; *Ellis v. Ohio Ins. Co.*, 4 Ohio St. 628.

GEORGE, C. J., delivered the opinion of the court.

The appellants, having indorsed to the appellee a bill of exchange, to which they claimed title through a forged indorsement, now insist that they incurred no responsibility by their indorsement, except a guaranty that the drawee would pay it on presentation. But the rule is well settled that an indorser warrants the genuineness of the prior indorsements on the bill, and also his title to the paper. Should it be ascertained, even after payment of the bill, that any of the indorsements are forged, the drawee can recover back the amount of the bill from the person to whom he paid it; and so each preceding indorser may recover from the person who indorsed the bill to him. The drawee is bound to know the signature of the drawer, but not of the indorser. The judgment, which is in accordance with these views, is

*Affirmed.*

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W. F. CROSS ET AL. v. M. LEVY ET AL.

PRACTICE. *Justice of the peace. Transfer of case. Estoppel.*

Parties to a suit pending before a justice of the peace who is interested in the result cannot, after they have obtained the substantial benefit of Code 1871, § 1340, by consenting to call in another justice who decides against them, object in the Circuit Court that he had no jurisdiction.

ERROR to the Circuit Court of Holmes County.

Hon. W. COTHRAN, Judge.

*H. S. Allen* and *E. F. Noel*, for the plaintiffs in error.

The transfer of the trial of this case from the justice who issued the summons to the other was proper under Code 1871, § 1340. The only object of the statute is to secure a disinterested judge. The waiver, by the agreement of the parties, cannot be repudiated. *McLeod v. Harper*, 43 Miss. 42. Had the objection been made in the justice's court, the defect could have been remedied.



*Hooker & Groce*, for the defendants in error.

No man can be judge in his own case. *Place v. Butternuts Co.*, 28 Barb. 503; *Washington Ins. Co. v. Price*, 1 Hopkins Ch. 1; *Gregory v. Cleveland Railroad Co.*, 4 Ohio St. 675. At common law the judgment is erroneous. Freeman on Judgments, § 145. By the Scotch law, the objection can be waived. But, where there is a statutory inhibition, there can be no waiver. Freeman on Judgments, § 146. Our statute disqualifies the interested justice, and provides for a transfer of the case to another justice. Code 1871, § 1340. The statute is not complied with by transferring another justice to the case.

GEORGE, C. J., delivered the opinion of the court.

The defendants in error brought suit before W. F. Cross, mayor of the town of Lexington, against one Barger as survivor, and against the said W. F. Cross and another, as executors of one Sheppard, the decedent and Barger having been partners in the lifetime of the former. The defendants pleaded a set-off in favor of Sheppard & Barger, and when the case came on for trial, Cross declined to sit, and it was agreed by all the parties that one Cochrane, another justice of the peace in that county, should be sent for, and asked to try the cause. Cochrane came, and, with the full consent of all parties and their counsel, tried the case in the room where Cross holds his courts, and made entry of his judgment on Cross's docket. Cochrane rendered judgment against the plaintiffs in that court, and they appealed to the Circuit Court. When the case was called for trial in the Circuit Court, M. Levy & Co., the plaintiffs, who had instituted the suit before Cross, and had consented that Cochrane should try the case instead of Cross, moved to have the suit dismissed, because of the trial before Cochrane, and the Circuit Court sustained their motion. From that judgment Cross and the other defendants sued out this writ of error.

It is now insisted, on behalf of M. Levy & Co., that the consent gave no jurisdiction to Cochrane to try the cause; that the statute (Code 1871, § 1340) required a transfer of the case to the nearest justice of the peace, Cross being interested, and that this was the only mode in which the cause could be

tried. We do not regard this position as just. The object of the statute, in requiring the transfer, was to have the case tried by an impartial and disinterested justice of the peace. This object was as well attained by the justice of the peace trying the case at the place agreed on by the parties as in his own court. These parties were competent to make the agreement to substitute Cochrane in lieu of Cross. Having done so, and gone into the trial, they will not be heard now to say that an actual transfer should be made, as they have secured all the benefits of such transfer. *Reversed and remanded.*

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J. M. CHISHOLM v. J. H. ANDREWS ET AL.

**EXECUTION SALE.** *Interest of vendor by title-bond.*

The interest in land which the vendor by title-bond has, where part of the purchase-money has been paid by the vendee in possession, is not salable under execution, and the purchaser from the sheriff cannot by bill in equity ascertain and subject such interest. *Bell v. Flaherty*, 45 Miss. 694, criticised.

**APPEAL** from the Chancery Court of Yazoo County.

Hon. E. G. PEYTON, Chancellor.

*Nugent & McWillie*, for the appellant.

The judgment-creditor of the vendor can subject the unpaid purchase-money in the vendee's hands. *Money v. Dorsey*, 7 S. & M. 15. A purchaser at the execution sale takes the vendor's interest in the land, subject to prior equities. *Bell v. Flaherty*, 45 Miss. 694. His rights relate back through the sheriff's deed to the judgment, and he obtains the judgment-creditor's rights. *Cocke v. Lane*, 3 S. & M. 763; *Kelly v. Mills*, 41 Miss. 267; *Walton v. Hargroves*, 42 Miss. 18; *Lambeth v. Elder*, 44 Miss. 80; *Humphreys v. Merrill*, 52 Miss. 92. Such purchaser, on showing the vendee's default, can in equity compel a discovery, and have the land sold, and the balance of the proceeds paid to him, after refunding what purchase-money has been paid. *Wright v. Henderson*, 7 How. 539; *Hopkins v. Carey*, 23 Miss. 54.

*A. M. Harlow*, on the same side.

*Hudson & Hudson*, for the appellees.

Possession of land under a title-bond is notice of title to a subsequent purchaser. *Dixon v. Lacoste*, 1 S. & M. 70; *Hall v. Thompson*, 1 S. & M. 448; *Wilty v. Hightower*, 6 S. & M. 845; *Walker v. Gilbert*, 7 S. & M. 456; *Jones v. Loggins*, 37 Miss. 546; *Bell v. Flaherty*, 45 Miss. 694; *Strickland v. Kirk*, 51 Miss. 795; *Taylor v. Lowenstein*, 50 Miss. 278. The last case is similar to the one at bar. The appellant acquired no title by his purchase at the execution sale, and cannot maintain a bill against the owner, of whose title he had notice.

CHALMERS, J., delivered the opinion of the court.

The appellant having purchased, or attempted to purchase, at execution sale, a tract of land, which the defendant in execution had sold by title-bond before the rendition of the judgment, and of which the vendee under the title-bond held possession, filed this bill to ascertain and reach the interest of the vendor. The bill cannot be maintained. It is the settled doctrine of this court that the vendor of land by title-bond, where any part of the purchase-money has been paid, has no interest in the land which is vendible under execution. *Money v. Dorsey*, 7 S. & M. 15; *Taylor v. Lowenstein*, 50 Miss. 278. It seems to have been intimated in *Bell v. Flaherty*, 45 Miss. 694, that the execution-purchaser, under such circumstances, while he did not acquire the legal title to the land, might by bill in equity reach and subject the money due by the vendee. The decisions of this court lend no sanction to this view. It has been uniformly held that the vendor by title-bond occupies towards the land sold the attitude of a mortgagee; and with equal uniformity it has been declared that, a mortgage being a mere security for a debt, the interest of the mortgagee was not vendible under execution. If not vendible, nothing, of course, passes by the sale, and the purchaser from the sheriff, having acquired nothing, has no *locus standi* in any court. *Buckley v. Daley*, 45 Miss. 838; *Beckett v. Dean*, ante, 232.

*Decree dismissing bill affirmed.*

## H. B. MCGEE ET AL. v. W. A. WALLIS ET AL.

1. **EQUITABLE ESTOPPEL.** *Void execution sale. Charge for purchase-money.*  
The purchaser of a testator's land at a sale under a judgment against his executor acquires no title, but if, in the belief that he is obtaining one, he pays the purchase-money which is applied to the judgment debt with which the land is charged by the will, a recovery in ejectment by the heirs will be enjoined until he is reimbursed.
2. **SAME.** *Doctrine applicable to sheriff's sale. Improvements.*  
The equitable doctrine which, under such circumstances, prevents the holder of the legal title from recovering the land without refunding the purchase-money, like that which compels compensation for improvements put thereon by the purchaser in good faith, is as applicable to a sale under an execution as to one under a decree of court.
3. **SAME.** *Caveat emptor. In what cases applicable.*  
No distinction, in this respect, between execution and private sales is established by the maxim *Caveat emptor*, which applies equally to sales by administrators or sheriffs in cases of want of ownership by the defendant in execution or the intestate, but is inapplicable to defects caused by a failure of the sale to pass the title.

APPEAL from the Chancery Court of Holmes County.

Hon. R. W. WILLIAMSON, Chancellor.

C. V. Gwin and T. C. Catchings, for the appellants.

Independently of the statute (Acts 1873, p. 41), a court of equity may charge the purchase-money on land, where it is shown to have been used in discharging liabilities of the estate, whether the sale was made in pursuance of the decree of a court of competent jurisdiction or not. The right accrues whenever the sale is made under process of law. Whether the process is a nullity or not, the principle is the same. The doctrine upon which claims of this character rest, as well as the right to recover for improvements, is discussed in the following cases: *Grant v. Lloyd*, 12 S. & M. 191; *Jayne v. Boisgerard*, 89 Miss. 796; *Short v. Porter*, 44 Miss. 538; *Cole v. Johnson*, 58 Miss. 94; *Gaines v. Kennedy*, 53 Miss. 103; *Valle v. Fleming*, 29 Mo. 152; *Hudgin v. Hudgin*, 6 Gratt. 320; *Bright v. Boyd*, 1 Story, 478; s. c. 2 Story, 607; *McLaughlin v. Daniel*, 8 Dana, 182; *Bentley v. Long*, 1 Strobb. Eq. 48; *Howard v. North*, 5 Texas, 290; *Dufour v. Camfranc*, 11 Martin,

607; *Peltz v. Clarke*, 5 Peters, 480. While the execution was a nullity, it purported to be legal process, was so treated by the parties, and under it the land was sold. Relying upon its validity, the purchaser paid for the land, improved it, and has occupied it for years. The heirs received the benefit of the sale, and no one has ever pretended that the title acquired was bad, until this ejectment suit was commenced. McGee's money has paid the debts of Wallis, which, by the terms of his will, were expressly charged upon his lands, and but for which they would long since have been sold. It would be grossly inequitable for them to recover the land without repaying the money thus expended by McGee in relieving their father's estate from liability to his former wards.

*R. A. Anderson*, for the appellees.

The purchaser at a sheriff's sale of land, made to satisfy a judgment of the Probate Court against an executor without notice to the heirs, has no equity in the land for reimbursement of the purchase-money which is applied to the judgment. If the Probate or Chancery Court, after notifying the heirs, had decreed the sale, the purchaser could have enjoined the heirs' recovery in ejectment. *Woods v. Ridley*, 27 Miss. 119; *Short v. Porter*, 44 Miss. 533; *Wilie v. Brooks*, 45 Miss. 542; *Cole v. Johnson*, 53 Miss. 94; *Gaines v. Kennedy*, 53 Miss. 103. But the appellants are not protected by the doctrine of those cases, or by the act of Feb. 11, 1873 (Acts 1873, p. 41), for the sale in question was not made under a decree or by an administrator, executor or commissioner. It was an execution sale, by a ministerial officer, who possessed no judicial powers, reported to no court, and did not make a deed with covenant of warranty. To such sales the rule *Caveat emptor* applies. Rorer on Judicial Sales, 458; *Davis v. Heard*, 44 Miss. 50; *Miller v. Palmer*, 55 Miss. 323. The appellants stand in no more favorable position than one who advances money to an executor to pay the debts of the estate. There is a want of the privity between the heirs and the purchaser, which is essential in order for the appellants to maintain their bill. 1 Dan. Ch. Prac. 322, note 6. The sale by the sheriff was void. Rorer on Judicial Sales, 246, 486, 488, 740, 784; *Young v. Lockhart*, 41 Miss. 460. If the purchaser is subro-

gated to the executor's rights by reason of the advance, the sale must be made on proper proceedings, to which the heirs are parties, on the probate side of the Chancery Court. No help is afforded by the fact that the land was charged by the will with the debts; for the executor, who alone had the power, did not make the sale.

GEORGE, C. J., delivered the opinion of the court.

Joseph Wallis was guardian of the four minor children of his deceased brother, and, as such, was indebted to each one of his wards. He died in November, 1861, without having made a final settlement of his accounts. He left a will, which was afterwards duly probated, in which he appointed one Weatherby his executor, and devised to him all his real and personal estate to have and hold the same in trust for the payment of his debts. The will directed that immediately after his death, his real estate and perishable property should be sold by the executor, and that his debts should be paid, and the remainder invested for the benefit of his heirs. Weatherby, the executor, settled the guardianship accounts of Joseph Wallis, and a considerable sum was found due to each of the wards, for which decrees were entered in the Probate Court against said executor, authorizing executions to be issued for the collection of the same. In 1866 executions were issued on these decrees, and placed in the hands of the sheriff of Attala County, who levied the same on a tract of land which belonged to the deceased guardian and testator at the time of his death. The sheriff, after due advertisement, offered said land to the highest bidder, and the appellant, H. B. McGee, became the purchaser for the sum of twenty-seven hundred dollars. McGee paid his bid to the sheriff, who paid it to the plaintiffs in the executions. McGee afterward sold the land with warranty of title to another one of the appellants, who sold to the third. In 1879 the heirs of the said Joseph Wallis brought ejectment and recovered this land, upon the ground that the sale was void, the executions and judgments against the executor not authorizing a levy on realty. On this state of facts, the appellants filed their bill in the court below, seeking to restrain the enforcement of the judgment in ejectment, until the plaintiffs therein should pay the

purchase-money bid at the sheriff's sale, and which had gone to the discharge of a valid debt of Joseph Wallis, the ancestor of the plaintiffs in ejectment. The defendants in that bill, the appellees here, demurred to it, and their demurrer was sustained and the bill dismissed, and the complainants appealed.

The precise question presented by this record, though new in this State, depends for its solution upon principles which have received the sanction of this court in several decided cases. It will be observed that the debt due the wards of Joseph Wallis, and established by the decrees of the Probate Court in their favor, was not only by the provisions of the statute, but also by the express terms of the will, made a charge upon all the estate of the testator, both real and personal; and that by the sale of the land, which is the subject of this controversy, the debt was satisfied. This sale was void, because a judgment against an executor does not authorize a levy on and sale of the real estate of his testator. The result is, that though the sale operated to raise the money, which went to the satisfaction of these decrees, yet no title was conferred by it on the purchaser. His money has exonerated the property of the estate from a legal and valid charge, and he is disappointed in the belief, on which he acted in parting with his money, that he was acquiring a valid title to the property which he bought. The heirs of the testator now seek to recover the land thus erroneously sold, and, at the same time, claim to retain the benefit which accrued to them by the satisfaction of the debt. Whether this claim can be successfully maintained is the question presented for our decision. If the appellants can successfully resist this claim, their right must be founded on the maxim of the common law, *Nemo debet locupletari ex alterius incommodo*, and on a similar maxim of the civil law, which Judge Story, in *Bright v. Boyd*, 1 Story, 478, 494, says more exactly expresses the idea, viz. *Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiores*.

This principle seems to have first received practical recognition in courts of equity in the rule adopted by those courts which gave to *bona fide* purchasers of land acquiring no title compensation for improvements which they had made under

the belief that they were the true owners. At first, however, in cases of that sort, relief was granted only when the true owner came into equity as a complainant seeking an account against the purchaser for mesne profits after a recovery of the land in an action at law, or when such owner had only an equitable title, and was compelled to sue in equity for a recovery of the land. In these cases, the court refused its aid to the complainant except upon the terms of compensation to the *bona fide* purchaser, for his improvements. Chancellor Walworth, as late as the year 1835, in *Putnam v. Ritchie*, 6 Paige, 405, declared that he had not been able to find a single case in England or America in which this relief was granted to the purchaser on a bill filed by him for that purpose; and he declined to make a precedent in that case, though recognizing the equity of the complainant's claim.

The first case, so far as our researches extend, in which this relief was granted on a bill filed by the purchaser against the true owner who had recovered the estate, is *Bright v. Boyd*, 1 Story, 478, decided in 1841. In that case, Judge Story, on a bill filed by the purchaser, not only gave him compensation for the improvements, but expressed his concurrence in the principle of the civil law, "that where a *bona fide* possessor or purchaser of real estate pays money to discharge any existing encumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him." This principle seems now to be fully established. It has been recognized in the following cases in this court: *Jayne v. Boisgerard*, 39 Miss. 796; *Short v. Porter*, 44 Miss. 538; *Cole v. Johnson*, 53 Miss. 94; *Gaines v. Kennedy*, 53 Miss. 103. In *Short v. Porter*, this court decided that a purchaser of land at a void sale, made by an administrator for the payment of debts, was entitled to be subrogated to the rights of a lien creditor whose debt had been discharged by the money paid on the void purchase. Chief Justice Simrall, speaking for the court, said that the equity of the complainant rested upon the impregnable ground that he (the purchaser), supposing that he was acquiring the title of the heirs of the intestate, at the sale made by the administrator, made a cash



payment, which was actually used and applied by the administrator to discharge a preferred lien on the land. As to the heirs, that application of the money exonerated their property *pro tanto*. It went to release an incumbrance on the land. They would not be permitted to recover back the land except upon the condition that they restored to the purchaser his money. He cited *Jayne v. Boisgerard*, 39 Miss. 796, which recognizes the same principle. *Short v. Porter* was confirmed in *Cole v. Johnson*, 53 Miss. 94. In *Gaines v. Kennedy*, 53 Miss. 103, this court, in a similar case, said: "It has been settled in our jurisprudence, on grounds most just and equitable, that where real estate has been sold for the payment of debts by an administrator who has so used the fund, the heir cannot recover the land, and hold it disincumbered of the intestate's debts, which have been discharged by the money of the purchaser, but the land will be charged with the amount of the debts thus paid off for the use of the purchaser."

A similar decision was made by the court of appeals of Virginia in *Hudgin v. Hudgin*, 6 Gratt. 320. In *Valle v. Fleming*, 29 Mo. 152, the purchaser at a void administrator's sale sought to be subrogated to the right of a mortgagee whose debt had been paid off by the purchase-money. The court, in an able and elaborate opinion, vindicated the doctrine of the above cited cases, and showed with how much more force it applies to fix a charge on the land for the money used to discharge a debt for which the estate was bound, than to compensating the evicted purchaser for his improvements. On this point, the court said: "It might have been urged that the true owner, if ignorant of his title and not aware of the improvements which the actual occupant was putting on the land, ought not to pay for improvements which he had not directly or indirectly authorized, and which might not at all suit his wants or his fancy. But such an argument could not be used in the case now before us. The purchase-money has gone to extinguish a mortgage which the owner was bound to extinguish before he could get the land. It was not a matter of taste or fancy."

These decisions seem to be decisive of the question before us; but it is attempted to distinguish these cases from the one

at bar. It is urged that in all these cases there was an attempt to sell the land by the legal representatives of a decedent under the decree of a competent court; that though the decree was void because the formalities prescribed by law were not observed, it was nevertheless an actual attempt to condemn and sell the property by a tribunal having jurisdiction over the subject; that a sale made by a sheriff stands on a different footing, since it is but the unauthorized act of a purely ministerial officer, as to whose sales the maxim of *Caveat emptor* applies with full force.

We do not perceive the justice of this distinction. The rule of the civil law, which we have quoted above from Judge Story, and which has now been fully incorporated into the equity jurisprudence of this State, embraces all cases in which a *bona fide* purchaser pays money to discharge any existing incumbrance or charge on the estate, having no knowledge of the infirmity of his title; and when it is applied to compensation for improvements made by a *bona fide* purchaser, who has been evicted by paramount title, the rule embraces all such, whether they were purchasers at judicial or at private sales. The equity of the rule, it is clear, has no reference to the mode in which the *bona fide* purchaser had acquired possession, since there can be no policy which would prefer one mode to another, provided only the acquisition of possession was honestly made under a *bona fide* belief that the occupant acquired title.

This good faith must exist as a pre-requisite to the right of the purchaser to demand compensation for improvements and a restitution of the purchase-money; and the ground upon which this compensation and restitution are exacted from the owner is the plain injustice of permitting him to reap the benefits of the unrecompensed labor and money of another. The right of the purchaser to demand restitution is grounded on his good faith in making the purchase; the duty of the owner to make the restitution arises from his having received the benefit of the money of the purchaser in releasing his estate from a legal charge. In cases like the one before us, the equity of the purchaser to a return of his money, and the inequity of allowing the true owner to recover the land disen-

cumbered, without restoring the money by which the encumbrance was discharged, rise so high as to fully justify the Supreme Court of Missouri, in the case above cited from that State, in characterizing any Code of Laws which would deny the one or tolerate the other as being "very imperfect or very inequitable." See 29 Mo. 164.

The rule can derive no force or vitality from the circumstance that the void sale has been made under the void order of a court. Such an order is utterly null, and without any force whatever. Being such, it *per se* imparts no force to the sale, confers no right on purchasers, and deprives the owners of none. It is the belief of the purchaser that he is getting a good title, and the actual application of the money to the benefit of the owner in removing a charge on his estate, which constitute the equity. But the principle has been applied, in this State, to other cases besides sales. In its most enlarged application as heretofore recognized in this State, it may be said to embrace all cases in which a person advances money with the intent that it shall be applied, and it is actually applied, to remove a legal charge from an estate belonging to another, where the advance is in consequence of a belief, on the part of the creditor, whether well or ill founded, that he to whom he makes the advance stands in such relation to the estate that he has a right to make the application. Thus, in *Woods v. Ridley*, 27 Miss. 119, it was conceded that a person lending money to an administrator could thereby fix a liability on the estate to repay it, if it were actually used to pay a valid charge on it, the administrator having no other assets in his hands with which to make the payment. By such application beyond assets, the administrator would become a creditor of the estate, and Chief Justice Smith said that the lender's equity would arise from the use of the money in the payment of the debts of the estate, and being a creditor thereby of the administrator he would be permitted to take his place and be subrogated to his rights. The maxim of *Caveat emptor* is also without force to establish the distinction relied on. That maxim, under the laws of this State, is equally applicable to sales made by administrators and by sheriffs. It applies where there is a failure of title, because of a want of ownership in the property

by the defendant in execution or in the intestate, but it does not apply to defects in the title of the purchaser, occasioned by a failure of the sale to pass the title of the defendant or intestate. And this is the case at bar; the title of the decedent is undisputed, and is that on which his heirs have succeeded in the action of ejectment.

In *Howard v. North*, 5 Texas, 290, the court applied the principle to a sheriff's sale, which was void, and therefore failed to convey the title of the defendant in the execution. The court declared that the purchaser would be entitled to have the amount of his bid, paid in discharge of the execution, refunded before a restoration of the property would be decreed. In *Dufour v. Camfranc*, 11 Martin, 607, Judge Porter, speaking for the court, after having declared a sheriff's sale void, said: "It has been proved that the proceeds arising from the sale (sheriff's) of the slaves were applied to the discharge of the judgment debts of the plaintiff, and the court is of opinion that he cannot recover in this suit, until he repay that money. This is the doctrine expressly laid down by Febrero, Lib. 3, Cap. 2, § 5, n. 357. And we readily adopt it; for nothing could be more unjust than to permit a debtor to recover back his property, because the sale was irregular, and yet allow him to profit by that irregular sale, to discharge his debts." In *McLaughlin v. Daniel*, 8 Dana, 182, the Supreme Court of Kentucky applied the principle to a sheriff's sale, declaring that the purchaser who had got nothing was entitled to recover from the defendant in execution the money paid in discharge of his debt.

We unhesitatingly announce our concurrence in the principle which entitles the complainants to relief. It would be in the highest degree inequitable to allow these heirs to recover this land, and, at the same time, to hold it cleared of the charge which the complainants' money has extinguished. There is no obligation on them to return the money, if they will allow the sale to stand; but if they seek to avoid the sale, they must do so only on the just condition that they restore all the fruits of it which they have enjoyed. If the complainants make out the case stated in their bill, they will be entitled to have a decree enjoining the judgment at

law, unless the amount of the purchase-money, which may be shown to have gone to the payment of just charges on the estate of Joseph Wallis with legal interest, be refunded to them. Unless this is done, and in some short time to be named by the Chancellor, the injunction should be made perpetual. As, however, it may turn out that the land is more valuable than the amount that may be found due, and the defendants may be unable to raise the money, the court may on their application order a sale of the land to meet the payment; but if a sale is ordered, it will be at the cost of the defendants exclusively. Should there be an excess in the proceeds of the sale, after paying the complainants' demand, it will belong to the defendants. The bill shows that mesne profits and improvements were settled by the judgment in ejectment, there being an excess of two hundred dollars in favor of the complainants, in the value of improvements over mesne profits. This two hundred dollars, should a sale be decreed, must also be paid out of the proceeds; but the mesne profits, accruing since the judgment in ejectment, must be charged to the complainants. Should no sale be asked for, the decree will simply be a perpetual injunction against the defendants' claim to the land.

*Decree reversed, demurrer overruled and cause remanded.*

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W. H. GARDNER v. E. P. McMANUS.

1. JUDGMENT LIEN. *Execution. Land formerly owned by debtor.*

A purchaser of land at an execution sale, under a judgment rendered after the debtor has parted with all interest therein, acquires no title.

2. SAME. *Trust deed. Conveyance of equity of redemption.*

The debtor's conveyance, after condition broken, to a grantee with notice of a prior unrecorded deed of trust, carries the title subject thereto.

3. SAME. *Subsequent foreclosure. Res inter alios acta.*

The subordination of the title of the debtor's grantee, by the creditor foreclosing his trust-deed, gives no title to the execution purchaser without notice.

ERROR to the Circuit Court of Lee County.

Hon. J. A. GREEN, Judge.

P. P. Strait, who in 1870 owned the lot in controversy, executed on Aug. 27 of that year, a deed of trust thereon, to secure his note payable to Foster & Gardner on Dec. 1 following. The trust-deed was not recorded. A deed conveying the lot from Strait to M. T. Burton was executed Feb. 14, 1872, and recorded on the 24th of the same month, and three days afterwards M. T. Burton conveyed to B. McManus, who took possession. The consideration paid by Burton, who was an agent of B. McManus, was Strait's note held by the latter; and both had notice of the deed of trust. On May 6, 1873, Harvey & Keith recovered judgment against Strait, and on July 31, 1875, an execution thereunder was levied upon the lot. Foster & Gardner, on Nov. 23, 1876, filed a bill in chancery against B. McManus, M. T. Burton, and P. P. Strait, to foreclose the deed of trust. The lot was sold under the execution, on Jan. 1, 1877, to the defendant in error, who is plaintiff in ejectment. The plaintiff in error, who is the defendant in ejectment, purchased on April 7, 1879, at the commissioner's sale under the decree of foreclosure. The court instructed the jury for the plaintiff that, if the deed of trust was not recorded when the judgment was obtained, they should find for the plaintiff; and refused to charge for the defendant that, if Strait conveyed to Burton before the judgment, the lien did not attach, and that, if the defendant bought at the sale under the decree foreclosing the superior lien, they should find in his favor.

*W. L. Clayton*, for the plaintiff in error.

Strait sold and conveyed to Burton, and he to B. McManus, more than a year before Harvey & Keith obtained judgment, which bound only the interest which Strait had in the land at its enrolment, or the levy of execution. *Simmons v. North*, 3 S. & M. 67; *Money v. Dorsey*, 7 S. & M. 15; *Hoy v. Taliaferro*, 8 S. & M. 727; *Kelly v. Mills*, 41 Miss. 267; *Walton v. Hargroves*, 42 Miss. 18; *Foute v. Fairman*, 48 Miss. 536. The Chancery Court did not annul the title of McManus, or re-vest it in Strait, nor decide that the title never passed from Strait; but the court held McManus bound by the deed of

trust, because he had notice thereof. Strait conveyed to Burton the equity of redemption, and the transaction was good against the world, except Foster & Gardner. The plaintiff, therefore, acquired no title at the sheriff's sale, and the court erred in giving the charge for the plaintiff, and refusing the charges for the defence.

*Barton & Cole*, on the same side.

Before the sale under the trust-deed, the grantor was the owner of the legal title to the lot, except as against the trustee, after breach of the condition. The forfeiture did not further affect the equity of redemption, which was practically the legal estate subject to a lien. That estate was salable, and Strait conveyed it before judgment was obtained. B. McManus then held subject to the trust-deed (Code 1871, § 2295), and the defendant, by his purchase at the foreclosure sale, acquired the entire interest, legal and equitable, in the lot.

*J. A. Brown*, on the same side, argued orally and in writing.

As the lot did not belong to Strait, when Harvey & Keith obtained judgment, the plaintiff, who must recover on the strength of her title, acquired nothing by her purchase at the execution sale. *Freeman v. Cunningham*, ante, 64; *Beckett v. Dean*, ante, 232; *Chisholm v. Andrews*, ante, 636.

*J. A. Blair*, for the defendant in error, made an oral argument.

*Blair & Clifton*, on the same side.

The deed of trust was forfeited before the conveyance to McManus, who therefore acquired at most only the equity of redemption, the legal title being in the trustee. *Thornhill v. Gilmer*, 4 S. & M. 153; *Brown v. Bartee*, 10 S. & M. 268; *Buck v. Payne*, 52 Miss. 271. As he purchased in bad faith, with notice of the trust-deed, he acquired no title. *Claiborne v. Holmes*, 51 Miss. 146. Whatever he acquired was extinguished by the chancery proceeding, under which the land was sold to satisfy the deed of trust. The legal effect of the decree is to cancel McManus's title, and the deeds to Burton and him are nullities. The verbiage of the decree amounts to nothing; its effect was to extinguish the equity of redemption. It is irrational to argue that it longer exists. It was only a

right to pay the secured debt, and, having been foreclosed, it has not passed to the defendant, who must rely upon the mortgage alone. The plaintiff is an innocent purchaser, without notice of the trust-deed, and must prevail. *Taylor v. Lowenstein*, 50 Miss. 278; *Loughridge v. Bowland*, 52 Miss. 546.

CAMPBELL, J., delivered the opinion of the court.

The instruction given for the plaintiff below should have been refused, and both of those refused to the defendant below should have been given. Mrs McManus acquired nothing by her purchase at the sale under the judgment against Strait. Long before the rendition of the judgment, Strait had parted with all his interest in the land by his conveyance to Burton, who conveyed to B. McManus; and although the title acquired by McManus by these conveyances was subordinated, by a decree of the Chancery Court, to the prior trust-deed which Strait had executed, his conveyance to Burton divested Strait of all interest in the land, and left nothing in him for the lien of the judgment rendered against him May 6, 1873, to fasten upon.

*Reversed and remanded.*

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LAURA A. CARSON ET AL. v. THOMAS P. LEATHERS.

1. INSTRUCTIONS. *As in case of nonsuit. When granted.*

An instruction to find for the defendant, if the jury believe all the evidence, is proper only where all the facts in evidence being taken as true, every just inference from them fails to maintain the issue, the conflict being resolved most favorably for the plaintiff.

2. COMMON CARRIERS. *Steamboat. Landing passengers.*

The owner of a steamboat, the custom on which is to notify passengers when their landings are reached, is liable for the negligence of its clerk in directing a lady, who has placed herself in his care, to disembark at night at the wrong landing, and for that of persons to whom the clerk has deputed the performance of this duty.

ERROR to the Circuit Court of Warren County.

Hon. UPTON M. YOUNG, Judge.

*Birchett & Gilland*, for the plaintiffs in error.



The instruction that the jury should find for the defendant, if they believed all the evidence, was erroneous. *Whitney v. Cook*, 53 Miss. 551; *Cooley v. O'Connor*, 12 Wall. 391; *Drakely v. Gregg*, 8 Wall. 242; *Hickman v. Jones*, 9 Wall. 197; *Greenleaf v. Birth*, 9 Peters, 292; *Railroad Co. v. Stout*, 17 Wall. 657; *Railroad Co. v. Van Steinburg*, 17 Mich. 99; *Conely v. McDonald*, 8 Cent. Law Jour. 229. Whether the evidence tending to maintain the issue is weak or strong, it is the right of the jury to pass upon it. In cases of negligence that rule is peculiarly applicable. *Gaynor v. Old Colony Railroad Co.*, 100 Mass. 208; *Ireland v. Oswego Plank Road Co.*, 3 Kernan, 526; *Keller v. New York Central Railroad Co.*, 24 How. Pr. 172; *Kenworthy v. Ironton*, 41 Wis. 647; *Chicago Railway Co. v. Scates*, 90 Ill. 586; *Craig v. New York Railroad Co.*, 118 Mass. 431; *Carland v. Young*, 119 Mass. 150; *Thurber v. Harlem Bridge Railroad Co.*, 60 N. Y. 326; *Gower v. Chicago Railway Co.*, 45 Wis. 182; Shearman & Redfield on Negligence, § 11, p. 13, and notes 1, 2; Proffatt on Jury Trial, §§ 295-298, and notes. The matter is thoroughly discussed in *Cooley on Torts*, 666-671. Negligence is always a question for the jury, when the measure of duty is ordinary and reasonable care. *Crissey v. Hestonville Railway Co.*, 75 Penn. St. 83; *West Chester Railroad Co. v. McElwee*, 67 Penn. St. 311. As to minors and female passengers, carriers by water sustain a relation different from that sustained by land carriers. The master of the ship or steamboat stands *in loco parentis* towards ladies, who are comparatively helpless and liable to imposition. *Thurber v. Harlem Bridge Railroad Co.*, 60 N. Y. 326; Redf. on Carriers, § 357; *Chamberlain v. Chandler*, 3 Mason, 242; *Smith v. Wilson*, 31 How. Pr. 272; Hutch. on Carriers, §§ 631, 632. The usages of polite society demand, and it is the custom on steamboats, and on this particular boat, for the clerk to see ladies off at their proper landings, and Mrs. Carson had a right to rely upon a performance of that custom and duty. Shearman & Redfield on Negligence, § 278. He neglected that duty, and delegated it to O'Kelley, who, thinking the boat had landed at Palmyra, took Mrs. Carson ashore. By the clerk's requesting O'Kelly to perform this duty for him, the defendant, Leathers, became

responsible for the wrongful landing of Mrs. Carson. Shearman & Redfield on Negligence, § 70; Wood's Master and Servant, § 308.

*J. D. Gilland*, on the same side, made an oral argument.

*Pittman, Pittman & Smith*, for the defendant in error.

The evidence wholly fails to make out the plaintiffs' case. It does not tend in any legal view to establish it. The duty of the court was therefore to give the charge complained of. *Perry v. Clarke*, 5 How. 495; *Frizell v. White*, 27 Miss. 198; *Garnett v. Kirkman*, 33 Miss. 389. The rule also prevails in the Federal courts. *Pleasants v. Fant*, 22 Wall. 116. It is an important power in this State, and should be used to prevent verdicts dictated by ignorance or prejudice, for after two such "idle ceremonies" the statute prohibits another trial. Code 1871, § 647. In *Wilds v. Hudson River Railroad Co.*, 24 N. Y. 433, the Supreme Court of New York repudiate the doctrine that because a case involves negligence it must be submitted to a jury. Cases cited by opposing counsel proceed upon the idea that there was evidence tending to prove negligence, which there is not in the case at bar. It was not the defendant's duty to see Mrs. Carson off. *Southern Railroad Co. v. Kendrick*, 40 Miss. 374. As to passengers, the obligation is to carry, not to deliver. Calling out the name of the landing is not an invitation to get out. *Cockle v. London & South Eastern Railway Co.*, L. R. 5 C. P. 457; *Bridges v. North London Railway Co.*, L. R. 6 Q. B. 377. If the carrier goes beyond the station, the passenger should request him to return. The clerk's custom of escorting ladies off the boat is not a duty which either he or Leathers owes the public or the plaintiffs.

*W. B. Pittman*, on the same side, argued the case orally.

CHALMERS, J., delivered the opinion of the court.

The plaintiffs sued the defendant to recover damages for a breach of duty on his part as a common carrier. At the conclusion of the testimony in the court below, the judge instructed the jury that, if they believed all the evidence in the case, they should find for the defendant, and, thereupon, the jury, as in duty bound, so returned their verdict. "Such an instruction is only proper where all the facts in evidence

being taken as absolutely true, every just inference from them fails to maintain the issue." *Whitney v. Cook*, 58 Miss. 551, 559; *Swan v. Liverpool Ins. Co.*, 52 Miss. 704. If there is any conflict in the evidence, the view which is most favorable to the plaintiff must be taken as absolutely true. The testimony shows this state of facts: Mrs. Carson, with her two little daughters, embarked at Vicksburg on the steamboat Natchez for Palmyra Landing, upon the assurance that she should be landed there. Being without a male escort, she placed herself under the care of the clerk of the boat. She was landed at two o'clock in the morning at Point Pleasant Landing, a mile distant from Palmyra, and was forced to spend the night, with her children, in an open warehouse, almost without fire, and to procure transportation next morning to her proper destination. The night was very dark, and bitterly cold. She was induced to disembark at Point Pleasant by assurances communicated to her by one Hickey and one O'Kelly that she had arrived at her landing, and the boat pushed off before she had time, after discovering her error, to re-embark. Hickey was a personal friend of the officers of the boat, travelling free, and, in return for the favor, assisted the clerk in various ways, and especially in the matter of escorting ladies on and off the boat. He was supposed by Mrs. Carson to be one of the clerks. O'Kelly was a passenger, and an acquaintance of Mrs. Carson's, and the clerk, on retiring for the night, requested him to see her safely on shore when her landing was reached. Both Hickey and O'Kelly supposed when they conducted her ashore that she was disembarking at Palmyra, and this mistake grew out of the fact that the boat had run past that place without stopping, and with the intention on the part of her officers of returning to it after making the landing at Point Pleasant.

Manifestly, under these circumstances, the instruction complained of was improperly given to the jury. It was proved that the custom of the boat was to notify passengers of their arrival at their places of destination, a custom that would seem indispensable at night, and Mrs. Carson had therefore a right to expect such notification. When she received it from Hickey, who, with the knowledge and

consent of the officers, assumed to act for them in such matters, and from O'Kelly, who, at the special instance and request of the clerk, was representing him in so doing, she had a right to act upon it. The defendant in error is bound not only by the acts of his clerk, but by the acts of those to whom, in this matter, the clerk had deputed the performance of the duties intrusted to himself. The case stands precisely as if the clerk had in person misdirected and led Mrs. Carson off the boat. Wood's Master and Servant, § 308; Shearman & Redfield on Negligence, § 70. It will be understood that we have, for the purpose of considering the instruction, stated the facts most strongly for the plaintiffs. It will be for the jury to say what the facts really were.

*Judgment reversed and new trial awarded.*

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THOMAS H. COOK v. THE STATE.

1. **INDICTMENT.** *Return by grand jury. Entry on minutes. Filing.*

If an indictment has been returned by the grand jury, and marked "filed" by the clerk, while the accused is at large, the entry of its return may, under Code 1871, § 2795, be made upon the minutes at any time after his appearance.

2. **SAME.** *Statute dispensing with entry. Effect on pending prosecution.*

Such entry is, however, unnecessary, if the indictment was pending and marked "filed" at the time of the passage of the amendatory act of Feb. 6, 1878 (Acts 1878, p. 199), which makes the filing of the indictment evidence of its return.

**ERROR** to the Circuit Court of Warren County.

Hon. UPTON M. YOUNG, Judge, did not sit in this case, but

Hon. A. G. MAYERS presided by interchange.

*H. F. Simrall*, for the plaintiff in error, argued the case orally and in writing.

The record fails to show that the indictment, under which the accused was tried, was returned into court by the grand jury according to the formula prescribed by law. The prosecution was begun, and the indictment purports to have been

found in 1873. The statute of 1878 has no application. The question was raised in the court below. It must be distinctly shown by the record that the indictment was found and returned into court. *Laura v. State*, 26 Miss. 174. No presumption can be indulged. *Jenkins v. State*, 30 Miss. 408; *Hague v. State*, 34 Miss. 616; *Pond v. State*, 47 Miss. 39. The effect of Code 1871, § 2794, is only to postpone the entry until after the defendant appears. *Cachute v. State*, 50 Miss. 165. In *Cornwell v. State*, 53 Miss. 385, the members of the court differ as to the construction, but the majority adhere to the former decision. Under either construction of the statute, however, this indictment should be quashed. Neither an entry on the minutes nor an indorsement on the indictment has ever been made showing an indictment against the plaintiff in error. The record cannot be aided by reference to the indictment or by the clerk's recitals in the transcript; and without these there is absolutely nothing to identify the indictment or show how it got into court. The entry of a criminal case on the docket, in 1875, or the word "filed," marked on this indictment, throws no light upon the subject. Without inference and intendment, the indictment cannot be sustained.

*L. W. Magruder*, on the same side, argued orally and filed a brief.

A citizen can be charged with crime and put upon trial only by the action of a grand jury. The formal requisites of such action are prescribed by law, and must appear by the record, which is the only admissible proof of such facts. The presentation by the grand jury of the indictment in open court is a fundamental element of what the law requires. The indictment itself is no evidence of such action. It is a judicial act, as necessary as the entry of a verdict, and must appear from the minutes. Its object is not alone to identify the indictment, but the minutes should show that the particular defendant by name was presented in open court as an indicted party. It is the policy of the law thus to surround the action of the grand jury with formality. This requirement has for ages been enforced with unbending rigor, as a preliminary prescribed for the protection of the citizen. In order to indi-

cate the estimation in which the rule has been held, and the purpose for which it was instituted, reference is made to the following decisions: *Gardner v. People*, 3 Scamm. 83; *Rainey v. People*, 3 Gilman, 71; *Chappel v. State*, 8 Yerger, 166; *Wrocklege v. State*, 1 Iowa, 167.

*T. C. Catchings*, Attorney General, for the State, filed a brief and made an oral argument.

The record complies with the law, which only requires it to show that the indictment was returned by a lawful grand jury. It was unnecessary for the minutes to contain the defendant's name. Enough appears to identify the indictment returned by the grand jury with that on which he was tried. He was not in custody when the indictment was found, and it would have been improper to enter his name until he was apprehended. Nothing appearing to the contrary, the presumption is that the term at which his name first appears was the one immediately succeeding his arrest.

GEORGE, C. J., delivered the opinion of the court.

The plaintiff in error was convicted of manslaughter in the court below. He moved for a new trial, and also in arrest of judgment, both of which were refused. It is not seriously insisted in this court that there was error in refusing a new trial; and, upon an examination of the evidence, we are satisfied that the court acted properly in refusing it. The alleged error, in overruling the motion in arrest of judgment, is pressed here with great zeal and ability; and we have examined the record with the care that the importance of the case demands, aided by the very able arguments made on both sides. The motion in arrest is based on an alleged failure of the record to show that the indictment was properly returned into court. It was marked "filed" by the clerk on March 27, 1873. The indictment was against P. H. and Thos. Cook, and in the entry of the return of it by the grand jury on the minutes at that term, it is stated to be an indictment against P. H. Cook, the other defendant. The plaintiff in error was not then arrested, and the clerk erased his name from the said entry on the minutes, so that it appeared to be an entry of an indictment found against P. H. Cook alone. This entry was

repeated for several terms, and until after P. H. Cook was tried and acquitted. It appears that after this Thomas H. Cook, the plaintiff in error, was arrested; and then, in the notices of the case appearing on the minutes of the court, it is always entered as "The State v. Thos. H. Cook," but with the same number stated in the original entry of the return of the indictment. The defendant pleaded to the indictment at the January Term, 1880, and was thereupon tried and convicted, as before stated. There never was any other entry of the return of the indictment by the grand jury made on the minutes of the court than that made in March, 1878, and before alluded to. If it is conceded that this entry was insufficient, it does not follow that the motion in arrest should have been sustained.

The indictment was marked "filed" by the clerk at the time it was presented by the grand jury; and by the statute then existing, Code 1871, § 2795, an entry on the minutes of its return was prohibited until the defendant had been arrested and was in custody or on recognizance. It is further provided, by that section, that the entry of the return of the indictment may be made on the minutes of the court *at any time* after the appearance of the defendant. Under this statute it was in the power of the Circuit Court to have caused the entry to be made at the time the trial of the plaintiff in error took place in January, 1880, if the court deemed such entry necessary. While the indictment was pending in the court, marked "filed," as before stated, and with the power in the court to cause its return by the grand jury to be entered on the minutes, and while therefore it was a good and valid indictment under which the plaintiff in error might have been lawfully tried, the statute of Feb. 6, 1878 (Acts 1878, p. 199), was passed. This statute provided that the filing of the indictment by the clerk should "be evidence of the proper and legal return into court of such indictment." It was therefore wholly unnecessary to have made any entry of its return on the minutes. There is nothing in the Act of 1878 to confine this part of it to indictments found after its passage; and it was entirely competent for the legislature to declare the effect of the filing of indictments which were found before its pas-

sage, in all cases where an indictment, at the time of the passage of the act, was properly pending, and could be made operative by action of the court thereafter to be taken. If the indictment had been in such condition at the time of the passage of the Act of 1878, that it could not, by the law as it stood before its passage, be made a valid indictment, then the effect of this act, as a revivor of the indictment, would present a very different question, as to which we express no opinion.

*Judgment affirmed.*

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MANIZA GROVES v. PRESLEY GROVES ET AL.

1. CHANCERY PRACTICE. *Deposition. Commissioner. Disqualification.*

A deposition should be suppressed, if taken by a commissioner who is the uncle of the party on whose behalf the witness is examined.

2. STATUTE OF LIMITATIONS. *Trust. Beneficiary in remainder.*

The Statute of Limitations does not begin to run against a *cestui que trust* in remainder until the termination of the particular estate.

ERROR to the Chancery Court of Leake County.

Hon. T. B. GRAHAM, Chancellor.

*O. A. Luckett, Jr.*, for the plaintiff in error.

1. The defendants in error are barred by the Statute of Limitations, Code 1857, p. 403, art. 31; Code 1871, § 2175. Ten years have elapsed since the beneficiaries became of age. Continuing express trusts form the only class excepted from the operation of the statute. *Murdock v. Hughes*, 7 S. & M. 219; *Edwards v. Ingraham*, 31 Miss. 272. This is not a trust of that character. The statute began to run on the death of the *feme covert*, notwithstanding the husband's life-estate.

2. The deposition should have been suppressed, because taken by a near kinsman of the defendants in error. Depositions are governed and regulated by the statute, and the party taking them must show that they conform to the statute. *Smith v. Natchez Steamboat Co.*, 1 How. 479; *Saunders v. Erwin*, 2 How. 732; *Martin v. King*, 3 How. 125; *Rupert v. Grant*, 6 S. & M. 433; *Hemphill v. McBride*, 12 S. & M. 620.

*J. D. Eads*, on the same side.



By virtue of Code 1857, p. 836, art. 24, the married woman at any time after the execution of the deed could have maintained her bill in equity to have the fee vested in herself. If, because of coverture, the statute did not run, it began when she died, for then the defendants in error, who were adults, could have filed a bill to enforce the trust. Her husband held the fee-simple as trustee, and until that was divested he could not have an estate by the courtesy. The two estates cannot co-exist, and the latter is merged in the former. If in *Murdock v. Hughes*, 7 S. & M. 219, the bill of sale had been to the mother for life, remainder in fee to the children, the plea of the Statute of Limitations would not have been maintained. The question is purely one of statutory law. The trust which arises under Code 1871, § 1779, is an implied trust, and is covered by §§ 2148, 2174, 2175, which embrace every trust known to the law except express trusts.

*J. W. Jenkins*, on the same side.

The wife had the right, on the conveyance of the land to her husband, to bring suit to divest the legal title. If he had died, the statute would have begun to run, because his death would have removed the coverture. But she died first, which had the same effect. Could the defendants in error have sued the father? Manifestly yes; and for their failure they are barred. The fact that he held possession by the courtesy does not affect the question, for they had the right to divest him of the legal title, without touching his beneficial life interest in the use of the land. The statute in force at the time this suit was brought is a transcript of the Code of 1857. Code 1871, §§ 2147, 2148. The fact that this is a trust estate makes no difference. *Murdock v. Hughes*, 7 S. & M. 219; *Livermore v. Johnson*, 27 Miss. 284; *Prewett v. Buckingham*, 28 Miss. 92; *Edwards v. Ingraham*, 31 Miss. 272. While the Statute of Limitations does not run against a married woman who was such at the time the right of action accrued, yet it begins to run against her assignee from the date of the conveyance. *Drennen v. Walker*, 21 Ark. 539. So, also, where a person having an interest in real estate is under a disability during her lifetime by reason of coverture, her heirs must bring their suit within the period of limitation, after her death. *Carpenter v. Schermerhorn*, 2 Barb.

Ch. 314. The disability which prevents the running of the statute extends only to the person on whom the first right descends. Angell on Lim. § 477.

*John Handy*, for the defendants in error.

1. The fact that the commissioner was related by blood to the complainants did not make him "interested." The statute directs that the commissioner shall be "disinterested." This means that he must have no personal interest in the cause, or in the result of it. This is the test, and the fact of relationship by blood did not disqualify a person as a witness at common law. The commissioner is not shown to be an untrustworthy man, and was competent. Enough evidence remains, however, after excluding the objectionable deposition, to make out the complainants' case.

2. The Statute of Limitations against the claim of the defendants in error did not begin to run until their right to the possession of the land accrued by the death of their father. 2 Perry on Trusts, § 860; *Murdock v. Hughes*, 7 S. & M. 219. Prior to his death, the most that they could have done was to file a bill in the nature of a bill *quia timet*, to have the trust declared as a matter of preventive justice, so that their rights, as heirs of their mother, might not be defeated by the intervention of creditors without notice of the trust, who are protected by the proviso to the statute. This was done in *Taylor v. Smith*, 54 Miss. 50. This sort of proceeding the heirs may initiate, but they are not required by law to do it; and, when instituted, it is not so much a proceeding against the trustee as a matter of protection against the claims of creditors, which, by possibility, might arise to defeat the rights of the remainder-men.

CHALMERS, J., delivered the opinion of the court.

John and Presley Groves filed their bill against their father's widow, their stepmother, for the purpose of setting up for themselves a resulting trust in the family homestead, on the ground that it had been bought with the money of their mother (the first wife), and the deed taken by their father in his own name. One of their most important depositions should have been suppressed. The commissioner who took it

was their uncle. A commissioner "must bear such relation to the parties as will secure his impartiality in the execution of the commission. He, in other words, should not directly or indirectly bear to either party such a relation as would authorize a presumption of a bias in the execution of the trust in favor of or against either party." *Tillinghast v. Walton*, 5 Ga. 335, 337; *Bean v. Quimby*, 5 N. H. 94; *Bryant v. Ingraham*, 16 Ala. 116. But, excluding the deposition taken by this commissioner, there remains sufficient competent evidence to establish the trust.

It is insisted, however, that the trust is barred by § 2175 of the Code, because, although only a short time intervened between the death of the father and the filing of this bill by the complainants, more than ten years had elapsed since the death of their mother, and, as they were of age at the time of her death, and could at once have instituted this proceeding, they are now barred by the statute referred to. The answer to this is, that the father, during his life, held the land as tenant by the curtesy, and though, under such circumstances, the *cestui que trust* in remainder may file his bill *quia timet* during the continuance of the life-estate, as was held in *Taylor v. Smith*, 54 Miss. 50, he is not bound to do so. A *cestui que trust* will not be deprived of his right to relief by any length of acquiescence, unless he has an immediate possessory title to the beneficial interest. For instance, when a person was entitled to the trust of a beneficial lease in remainder, after the determination of a previous life-estate, it was held that the statute did not begin to run until the death of the life-tenant. *Hill on Trustees*, 266; *Bennet v. Colley*, 5 Sim. 181. "The rights of the *cestui que trust* cannot be barred until his rights fall into possession. If, therefore, the *cestui que trust* holds in remainder or reversion, the statute will not begin to run until his right to the possession falls in by the determination of the particular estate." 2 Perry on Trusts, § 860.

*Decree affirmed.*

## JOHN A. KLEIN, EXECUTOR v. ALICE FRENCH ET AL.

1. EXECUTOR. *Negligence. Debts due estate. Debtor's non-residence.*

An accommodation acceptor's executor, who pays the bill of exchange, and fails to sue the drawer, is not relieved from liability to the heirs for loss of the debt by the fact that the drawer resides in another State.

2. SAME. *Excuse for neglect to sue. Legal advice. Suppression of facts.*

Such executor is not excused from suing by the fact that a lawyer to whom he sent the bill for collection, but who was not notified that the executor had paid it as the acceptor's representative within the statutory period, advised him that the action was barred on its face.

3. SAME. *Conflict of laws. Suit in foreign jurisdiction.*

If the domiciliary administrator or executor has possession of a note payable to the decedent or bearer, or if he has paid the decedent's accommodation acceptance of a bill of exchange, he may sue, in his own name, in a foreign jurisdiction.

4. SAME. *Conversion of debt. Costs and attorney's fee.*

In such case, suing in his own name is no evidence of conversion, but a rightful exercise of power for the benefit of the estate, from which the executor should be allowed costs and attorney's fees if he fails to maintain the action.

5. SAME. *Improper compromise. Estoppel to deny power.*

After the executor has taken possession of such paper and compromised it, without consulting the heirs or notifying them that he has no power to act, he cannot avoid liability for loss occasioned thereby, upon the ground that he could acquire no such power.

6. CONFLICT OF LAWS. *Domiciliary and ancillary administrations.*

The principle that a grant of letters testamentary or of administration confers no power in a foreign State applies without exception or qualification to ancillary administrations, but as to domiciliary administrations there are recognized exceptions.

7. SAME. *Executor's power over foreign debt. Suit and payment.*

The domiciliary administrator, or executor, may receive payment from or sue a debtor residing in a foreign jurisdiction if he voluntarily comes within the State in which the administration is granted.

8. SAME. *Payment in foreign jurisdiction. Subsequent administration there.*

A voluntary payment to such executor or administrator by a foreign debtor in a State where there are no debts and no ancillary administration is a good acquittance even if an ancillary administrator is afterwards appointed.

9. SAME. *Ancillary administration. Transmission of surplus.*

In the absence of special reasons making proper a distribution by the ancillary administrator, he should transmit the surplus, after paying citizens of the foreign State, to the domiciliary administrator who is entitled thereto.

10. SAME. *Ownership of debts. How sued for in foreign jurisdiction.*

The principal administrator is the owner of all debts due the intestate, the evidence of which such as bills and notes are in his possession, wherever the debtor resides, but generally must sue in a foreign jurisdiction by means of ancillary administration.

11. EXECUTOR. *Renting houses. Negligence. Good faith.*

An executor who acts in good faith in fixing the rent of houses belonging to the estate and gets all he can from the tenants, whose places if they vacate he has good ground to apprehend cannot be filled, is not liable for more than he receives, although witnesses twelve years afterwards think he might have obtained a higher rent.

APPEAL AND CROSS-APPEAL from the Chancery Court of Warren County.

Hon. UPTON M. YOUNG, Chancellor.

*Pittman, Pittman & Smith*, for the appellant and cross-appellees.

1. The court erred in charging Klein with the acceptance, for the following reasons. (1) As executor he was not chargeable with the collection of that claim, and was under no duty in respect to it. Every grant of administration is confined to the State in which it is made, and confers no power to collect assets in other States. *Riley v. Moseley*, 44 Miss. 37. A foreign administrator cannot be sued here even on a judgment rendered against him in the State in which he was appointed. *Winter v. Winter*, Walker, 211. An executor can neither sue nor be sued in his official capacity in the courts of another State. *Boyd v. Lambeth*, 24 Miss. 433; *Vaughan v. Northup*, 15 Peters, 1; 2 Kent Com. 432, notes; Story Conf. Law, §§ 514, 529. Payment to an original administrator, as against a foreign administrator subsequently appointed in the debtor's domicile, is not good, and the latter administrator is entitled to recover the debt. *Vaughn v. Barret*, 5 Vt. 333. A debt, by the death of the creditor, becomes assets in the debtor's place of residence. *Abbott v. Coburn*, 28 Vt. 63; *Hilliard v. Cox*, 1 Salk. 37; s. o. 1 Lord Raym. 562. A class of

cases, like *Trevothick v. Austin*, 4 Mason, 16, and *Doolittle v. Lewis*, 7 Johns. Ch. 45, holds that a voluntary payment to a foreign administrator is effectual upon principles of national comity, but no case holds that such administrator has any right to release or compromise the claim. The sum received by Klein in compromise may be a good payment *pro tanto*, but an administrator can be appointed in Kentucky, and sue and recover the balance. 1 Stanton's Rev. Stats. 513, § 3. It is urged that Klein's duty was to take out letters in Kentucky and Louisiana in order to collect this debt. There is no authority for the proposition. On the contrary, in the case of *Satterwhite v. Littlefield*, 13 S. & M. 302, the court refused to allow travelling expenses to Georgia to an administrator who went there to collect debts due the estate upon the ground that they were subject to the jurisdiction of the courts of that State where they were situated. It is insisted that Klein should have sued in his own name in the foreign jurisdictions. But by that course he would have subjected himself to costs and attorney's fees for which he would have received no compensation in case of failure, and by the conversion of the claim might have rendered himself liable for the whole of it. *Jenkins v. Plombe*, 6 Mod. 92. He was not bound to take any personal risk, but could exercise his option. No ground exists to suspect him of bad faith, but he did with the acceptance what he would have done if it had been his own property. It is by no means clear, however, that Klein could have sued in his own name. *Norcross v. Boulton*, 1 Harr. (N. J.) 310; *Stewart v. Richey*, 2 Harr. (N. J.), 164. (2) Klein was guilty of no carelessness or neglect of duty in respect to the claim, but made an honest effort to collect it, doing all that a prudent business man could, which is all that the law demands. *Berry v. Parkes*, 3 S. & M. 625; *Smith v. Hurd*, 8 S. & M. 682; *Bailey v. Dilworth*, 10 S. & M. 404; *Anderson v. Gregg*, 44 Miss. 170; *Williams v. Campbell*, 46 Miss. 57. The lawyer advised the compromise, and Klein assented. It would have been folly for him to study international law, in order to find a reason for acting contrary to his lawyer's advice. Such things cannot be required of a business man who undertakes the administration of an estate.

2. It was proper to overrule the exceptions concerning the rents. The tenants would have left the houses vacant, if the rents had been higher. Klein was very diligent in the matter, and he did the best he could under the circumstances. His only offence is that having tenants, who would pay a reasonable rent, he did not drive them out by charging more, and wait for some one to fill their places. Had he done this, the exceptors would have charged him with the rent which he lost. He was between two fires. Klein is shown to be a good business man in his own affairs; and it appears that he leased the lots in question on the same terms that he made for similar property of his own.

*W. B. Pittman* and *Murray F. Smith*, on the same side, argued the case orally.

*R. S. Buck*, for the appellees and cross-appellant, made an oral argument.

*Buck & Clark*, on the same side.

1. Looking to the exceptions on the subject of rents and the testimony in relation thereto, it appears that the rents of the lots were rapidly reduced after Klein took charge, and underwent changes which are incomprehensible except upon the theory of gross negligence. He allowed the tenants to dictate their own terms, without an effort to secure others or even allowing it to be known that he would lease at a better rent. There is no question that the rental value of the property was twice as much as he received. Tenants could have been obtained who would have paid the proper rent. In fact, the persons in possession would have submitted to it, rather than have vacated. Klein's mismanagement is made sufficiently apparent to entitle the distributees to have him charged with rents lost to them by his indifference and neglect.

2. By his compromise of the White debt, Klein inflicted a loss upon Peale's estate which could have been avoided by reasonable diligence on his part. If an executor releases a debt due his testator, he is chargeable to the amount of the debt whether he received it or not. 3 *Williams on Executors*, 1896, 1900. While he may avoid the liability by showing that the compromise was for the benefit of the estate, the burden is upon him to prove that fact. *Wyman's Appeal*, 13 N. H.

18. It is a *devastavit* on the executor's part to delay commencing action until the debt is barred, and he is liable, if he subjects the estate to the payment of a security debt which he could have collected from the principal debtor. *Chambers's Appeal*, 11 Penn. St. 436; *Tuggle v. Gilbert*, 1 Duvall (Ky.) 340. The same principles have been adopted by the courts of this State, from an early day. *Berry v. Parkes*, 3 S. & M. 625; *Bailey v. Dilworth*, 10 S. & M. 404; *Gulledge v. Berry*, 31 Miss. 346; *Banks v. Machen*, 40 Miss. 256. The doctrines are approved and the rule as to the burden of proof reiterated in the recent case of *Moffatt v. Loughridge*, 51 Miss. 211. Klein having failed to collect the debt, when there was ample property to pay it, is chargeable therewith, unless his excuses for the compromise are good. He says that he was advised that the claim was barred by the Statute of Limitations, and that he could not make White's estate pay it. It was not barred, for the reason that the statute did not begin to run until Klein paid the debt. *Scott v. Nichols*, 27 Miss. 94; *Henderson v. Thornton*, 37 Miss. 448; Angell on Lim. § 131. Klein failed to communicate to his counsel the fact which avoided the bar that was apparent on the face of the bill of exchange. Klein assumed the administration of this estate; he assumed personal liability for its losses, arising from his acts as executor, when it appears that his acts were the result of bad advice, or of assuming as true what was not true, when by ordinary efforts he could have known the truth and avoided the loss. A trustee cannot shift his responsibilities to another. The lawful execution of a trust demands the exercise of the trustee's judgment. If he acts upon the judgment of others, he is bound by the consequences, if they are disastrous to the trust estate. When a correct understanding of a state of facts is necessary to a due execution of a trust, and the trustee has that understanding, or by reasonable effort can obtain it, he is held responsible for the results of failing to adopt a correct basis of action. There would be no protection for a trust estate, if the trustee could avoid responsibility by showing that his losses were the result of his acting upon the improvident or incorrect advice of others. Applying these principles to this case under the evidence found in the record, Klein



cannot escape responsibility for the loss to Peale's estate, resulting from his compromise of the White debt.

8. The proposition that the compromise is not binding cannot be maintained. The Kentucky statute (1 Stanton's Rev. Stats. p. 518) cited by opposing counsel does not apply. Klein is liable for all loss occasioned to Peale's estate. *Whitney v. Cook*, 58 Miss. 551; *Sample v. Lipscomb*, 18 Ga. 687; *United States v. Child*, 12 Wall. 232. If he sacrificed the interests of the estate by the compromise, he assumed personal liability for the loss occasioned by the act. 3 Williams on Executors, 1799, 1801. Klein had ample power to sue in the domicile of the debtor. The debt was due to him as executor. Debts in respect of the right of property do not follow the person of the debtor, but that of the creditor. *Thorne v. Watkins*, 2 Ves. Sr. 35; *Wilkins v. Ellett*, 9 Wall. 740; *People v. Eastman*, 25 Cal. 603. He could have sued either as executor or in his own name, and his failure to collect the debt was a *devastavit*. *Williams v. Moore*, 9 Pick. 432; *Mowry v. Adams*, 14 Mass. 327; *Brown v. Lewis*, 9 R. I. 497; *Barrett v. Barrett*, 8 Greenl. 353; *Gage v. Johnson*, 20 Maine, 437. He would not by suing in his own name have been held either for costs or for conversion of the debt, but his expenses would all have been allowed in case of failure out of the other property of Peale's estate. Having assumed the trust, his duty was to protect the estate; and, if ancillary administration was necessary in order to sue in Louisiana or Kentucky, he should have taken out letters there. *Anderson v. Gregg*, 44 Miss. 170; *Helme v. Sanders*, 3 Hawks (N. C.), 563; *Schultz v. Pulver*, 11 Wend. 361.

GEORGE, C. J., delivered the opinion of the court.

Jacob Peale, in his lifetime, accepted the draft of one Z. White for his accommodation. White failed to put Peale in funds to meet the draft, and Peale having made an arrangement for an extension of the time of payment soon afterward died, having by his will appointed the appellant, Klein, his executor, who qualified as such, and on January 1, 1868, paid the bill, as the representative of Peale. Z. White died in the autumn of 1868. He was domiciled, at the time

of his death, in the State of Kentucky. He also owned a valuable plantation in Louisiana, near the city of Vicksburg, where the executor resided. His estate in Kentucky left a considerable surplus for the heirs after the payment of all debts, — larger than the amount of the bill of exchange. His plantation in Louisiana was worth ten thousand dollars, and was incumbered to the amount of three thousand dollars. In 1870, Klein compromised the claim against White, accruing from his having paid the bill of exchange for him, at one thousand dollars. The amount of the bill, when paid by him, was over two thousand eight hundred dollars. Klein filed his final account as executor of Peale, and in it charged himself with the amount he had thus received. The appellees, who are the heirs and distributees of Peale, excepted to the account, insisting that Klein was guilty of a *devastavit* in compromising the claim against White for about one-third of its value, and that he ought to have collected it in full, as it appeared that White was amply able to pay it in his lifetime, and that the assets of his estate, both in Louisiana and Kentucky, were sufficient to pay this after the payment of all other debts. Several objections are made to this claim of the distributees, the principal of which are as follows: First. That Klein's letters-testamentary gave him no power, and imposed on him no duty to collect this debt, as White, the debtor, was a non-resident of the State at the time of Peale's death. Second. That notwithstanding White's estate turned out to be solvent, yet Klein acted in the compromise under the advice of counsel, and was guilty of no negligence.

It is true that the grant of letters-testamentary or of administration is local, confined to the State in which the grant is made, and that such grant confers no power on the executor or administrator in a foreign State. This principle is applied without exception or qualification to ancillary administrators, since they necessarily have no concern with any assets except those within their local jurisdiction, and their sole duty is to collect the assets there, and, after payment of claims in that jurisdiction, to remit the surplus for final distribution to the executor or administrator appointed in the domicile of the decedent. But when applied to executors and administrators

appointed in the domicile of the deceased, whose administration is called the principal one, there are recognized exceptions. Thus it is settled that the principal or domiciliary administrator may receive voluntary payment from, and even sue, a debtor residing in a foreign jurisdiction, if he shall voluntarily come within the State in which he is appointed. Story Conf. of Laws, § 513. It is also settled that, where there are no debts in the jurisdiction where a foreign debtor resides, and no ancillary administration has been granted there, the principal administrator may, in such foreign State, receive a voluntary payment from the debtor, which will be a good acquittance to him, even if an ancillary administrator should be afterwards appointed. *Wilkins v. Ellett*, 9 Wall. 740; *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Trecothick v. Austin*, 4 Mason, 16. And it is further settled that, if the principal administrator have possession of a note payable to his intestate or bearer, he may, as the lawful holder and bearer of such note, sue on it in a foreign jurisdiction. Story Conf. Laws, § 517.

The principal administrator is entitled to have the surplus in the hands of an ancillary administrator transmitted to him for the payment of debts; and such surplus will also be generally transmitted to the principal administrator for distribution among the legatees; and this course is generally pursued, unless there is some special reason making it just and proper for this distribution to be made by the ancillary administrator. Wharton Int. Law, § 619; *Garland v. Rowan*, 2 S. & M. 617. Accordingly it is held that the principal administrator is the owner of all the debts due to the intestate, wherever the debtor may reside, as such debts are now recognized as following the person of the creditor, and have locality at his domicile; and especially are this ownership and title of the principal administrator recognized as to all debts, the evidences of which, as bonds, bills and notes, come to his possession in the place of the domicile of the intestate. The Supreme Court of the United States, in *Wilkins v. Ellett*, 9 Wall. 740, after stating that the personal estate of the deceased is to be regarded, for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile, said: "The original administrator, therefore, with letters taken out

at the place of the domicile, is invested with the title to all the personal property of the deceased for the purpose of collecting the effects of the estate, paying the debts, and making distribution of the residue, according to the law of the place or the directions of the will, as the case may be." This principle seems also to be recognized in *Garland v. Rowan*, 2 S. & M. 617, and in *Satterwhite v. Littlefield*, 13 S. & M. 302. Certainly, for all purposes of taxation and the exercise of governmental authority, the debts have the locality of the creditor, and not of the debtor. The creditor may be taxed on his foreign debts where he resides, and he cannot be taxed for them in the jurisdiction of the debtor. *Davenport v. Mississippi and Missouri Railroad Co.*, 12 Iowa, 539; *People v. Eastman*, 25 Cal. 603; *State Tax on Foreign-held Bonds*, 15 Wall. 300.

It thus appearing that, at least as to debts due the decedent, the securities for which are in possession of his principal and original administrator, the title and ownership are in the latter, with the right to receive payment and give acquittances therefor, it follows that he would be held responsible for their due administration, as in case of domestic debts, if there were no other obstacle to their collection than exists in relation to domestic debts. Such an obstacle does, however, exist, and to the extent that it is insurmountable by the use of ordinary and reasonable diligence by the administrator, it will furnish a legal excuse for a failure to collect a foreign debt. This obstacle is the want of power in the principal administrator to sue for and recover the debt in the foreign State. For reasons of policy, recognized in the comity of nations, each State in which a debtor of a foreign decedent may reside, generally, though not universally, refuses aid through its courts to a foreign administrator to collect the debt, because it will not allow the transmission of the property within its limits to a foreign State, until the claims of its own citizens on it have been discharged. Hence, every State has usually required an ancillary administration within its own jurisdiction, before it will afford aid through its courts to the collection of the debts due to foreign decedents; so that the creditors within that State may be first satisfied, before the transmission of the assets to the place

of the principal administration; but it so far recognizes the rights of the principal administrator, as to give to him or his nominee the appointment of ancillary administrator, and to direct the surplus, after paying its own citizens, to be transmitted to the place of the principal administration.

The principal administrator's duties and responsibilities in reference to a foreign debt, the evidence of which he has in his possession, can be easily ascertained from the foregoing principles. He has the title and the possession; he has the right to receive voluntary payment; he has the right to apply for and receive the appointment of ancillary administration, or to secure it to his nominee. He cannot, therefore, hold the evidence of debt and do nothing; for this would be most unjust to the distributees, and would result in a loss of the debt to them, unless voluntary payment was made. He should therefore take such reasonable steps as are within his power to collect the debt. He should, except where the debt is too small to authorize the expense, attempt, in good faith, either to secure the appointment of ancillary administrator for himself, or for some discreet and suitable person to be selected by him. Should he be unable to comply with the terms — as giving security — required for the appointment, that would excuse him from making application for a personal appointment. He should then take proper steps to have another appointed, and turn over to him the collection of the debt. He will be held to be excused only when he has shown that he has done all that was reasonably within his power to secure the collection of the debt. He has not done his duty when, as in this case, he has merely transmitted the claim to a lawyer in the foreign State for collection, when he has been apprised in ample time that no steps have been taken for collection by his attorney; nor has he done his duty when he accepts as a compromise whatever sum the debtor or his legal representative shall voluntarily pay. *Schultz v. Pulver*, 11 Wend. 861; *Helme v. Sanders*, 8 Hawks (N. C.), 568. But in this case the executor was without the excuse of a want of power to sue. He could have sued in a foreign State in his own name. Peale was not a creditor of White at the time of the former's death. He was merely his surety. The relation of cred-

itor and debtor was not created till Jan. 1, 1868, when Klein, as executor, paid the acceptance. In such a case, the rule is that the administrator may sue the principal, either in his own name or as administrator. *Mowry v. Adams*, 14 Mass. 327; *Williams v. Moore*, 9 Pick. 432; 2 Williams on Executors, 878. Having this right, he was without excuse in not bringing suit against White either in Louisiana or Kentucky. It is urged, however, in opposition to this view, that, if Klein had sued in his own name, it would be evidence of a conversion of the debt to his own use, and that he would not have been entitled to costs and attorney's fees in case he failed to collect, and might also have been made responsible for the whole debt. If this be conceded to be the rule when suit is brought against a domestic debtor by an administrator in his individual right, and when he might have sued in his representative capacity, it would not apply to a suit against a foreign debtor. In such a case the administrator would have no choice. He must sue in his own name, or not at all. It would be the clear duty of the court, to which he was responsible for his administration, to hold that, having no choice but to sue in his own name, suing in that way was no evidence of a conversion, but a rightful exercise of his powers for the benefit of the estate.

It also appears that Klein acted on the theory that it was his duty to collect the claim, and that he either had the right to sue, or could easily have acquired it. The ground on which he rests the compromise, as shown by his deposition, is almost exclusively that he was advised that the claim was barred by the Statute of Limitations at the time the compromise was made. He took charge of the claim, and placed it in the hands of a lawyer for collection, and refused at one time to accept a compromise. He assumed to exercise the duty of an executor rightfully having the power to enforce collection, and did nothing to notify the heirs and distributees of Peale that he would not discharge fully the trust thus assumed. He made the compromise and surrendered the claim without consulting them, or without even having given them notice that he did not possess the power to collect, or did not intend to acquire that power. Under these circumstances, he will not be heard

to urge, as an excuse for negligence in the business thus assumed by him, that he had not the requisite power to act, and could not acquire it.

It is clear, from the evidence, that Klein might have collected the claim if he had sued, or caused suit to be brought; and that the compromise was wholly unnecessary. He claims, however, that he is exonerated, because he acted under the advice of counsel. It appears that counsel did advise him to compromise, upon the ground that the claim was barred by the Statute of Limitations of Louisiana. The attorney, under whose advice he acted, stated in his deposition that he had nothing placed in his hands, except the bill of exchange drawn by White, and accepted by Peale; and that, by the law of Louisiana, if nothing more appeared than what was shown on the face of the bill, the claim was barred. The attorney was not advised that Peale was an accommodation acceptor for White, and that his executor had paid the draft for White's benefit. He states that the claim thus arising from the payment was not barred, and that he would not have given the advice if he had known these facts. They were well known to Klein, and he was guilty of inexcusable negligence in not communicating them to his attorney. It was his duty to communicate all the material facts to his attorney, if he desired to protect himself by his advice. This exception to his final account was therefore properly sustained.

The exceptions to the account of Klein, that he did not receive as much rent for the store-house and dwelling of Peale as he ought, are not sustained by the evidence, and were properly overruled. It is not shown that Klein, who is proved to be a good business man, and interested largely at the time in real estate in Vicksburg, did not act in good faith in the prices fixed by him for the rent of these houses. Witnesses now think that in 1867 and 1868 he might have received more; but it is shown clearly that Klein got all he could from the tenants, and that there was reasonable ground for the apprehension which he felt, that if he turned out these tenants the property might be vacant. We see nothing in his conduct in this matter which ought to subject him to the payment of a larger sum than he received.

*Decree affirmed.*

## J. J. MAYO v. E. F. CLANCY, ADMINISTRATRIX.

1. **BILL OF REVIEW.** *Error apparent. Newly discovered evidence.*

A bill of review is not maintainable unless it points out errors on the face of the decree or is predicated on newly discovered evidence.

2. **SAME.** *Decedent's estate. Final settlement. Extraneous facts.*

In determining whether there is error apparent in an administratrix's final settlement, the court cannot look beyond the decree and account, or, on demurrer, consider facts *aliunde* alleged in the bill of review.

3. **SAME.** *Land of decedent. Leasehold. Administratrix's rights.*

If it appears from the account and decree that the administratrix put repairs on the decedent's land, and distributed the rents equally between the widow and heir, that is not error apparent, for the interest in the land may have been a chattel.

4. **BILL TO IMPEACH DECREE.** *Infant. Evidence aliunde.*

Under Code 1871, § 1265, a party may, within a year after attaining majority, attack by original bill a decree rendered against him during minority by alleging error to be shown by evidence *aliunde*.

5. **SAME.** *Attitude of party more than a year after he is of age.*

After the year he stands to the decree as if he was an adult when it was rendered, except that upon a charge of fraud and imposition in obtaining the decree the helplessness and inexperience of his infancy may be considered.

APPEAL from the Chancery Court of Holmes County.

Hon. R. W. WILLIAMSON, Chancellor.

*J. W. Jenkins*, for the appellant.

Under Code 1871, § 1265, the decree was not conclusive until one year after the appellant became of age, so that this bill was filed within the year required by Code 1871, § 1270. The latter section is however repealed, and Code 1871, § 2160, is now alone operative. The bill was therefore in time after the decree became final. Story Eq. Pl. § 408. Is there error apparent on the face of the record? Not only the decree but all the papers in the case may be examined in considering this question. Story Eq. Pl. § 407. The land went to the heir. Code 1857, p. 452, art. 110. Distributing the rent and making improvements was such error. If the decree violates a statute, it will be set aside on bill of review. Story Eq. Pl. § 405.



*Hooker & Groce*, for the appellee.

A bill of review will not lie to open an administration. Prior to the act of 1846, bills of review could not be entertained in the Probate Court. *Cowden v. Dobyns*, 5 S. & M. 82. They are of statutory origin in administration matters. The distinction between the equity and probate practice is preserved in the Chancery Court under Code 1871. *Troup v. Rice*, 49 Miss. 248. If that distinction is correct, a bill of review will not lie to set aside a decree made in the course of an administration. A minor's remedy is exclusively under Code 1871, § 1265, by which the bill can be filed only within a year after the decree sought to be reviewed. The present bill cannot be maintained under that statute, but the decree is binding and conclusive. There is no error apparent in the settlement, and the facts alleged *aliunde* cannot be considered. *Enochs v. Harrelson*, *ante*, 465. The decedent may not have owned a freehold estate in the land. *Webster v. Parker*, 42 Miss. 465. It must be presumed that the administratrix did her duty. The allegations of the bill are not admitted by the demurrer, which raises only the question of error apparent on the face of the record.

GEORGE, C. J., delivered the opinion of the court.

The appellant having first obtained leave of the Chancellor, filed his bill to review the final settlement of the administratrix of his father's estate. The account was audited and allowed in February, 1872. At that time the appellant was a minor. He arrived at majority on March 11, 1876, and in January, 1878, less than two years after he became *sui juris*, he filed this bill. A demurrer was sustained to the bill, and he appealed. Considered as a bill of review, it is not maintainable, because it does not point out errors apparent on the face of the decree predicated on newly discovered evidence.

The errors mainly relied on relate to certain credits allowed the administratrix for lumber and repairs on land, and to the division of the balance due on the final account equally between the appellant, who was the heir, and the appellee, who was the widow of the intestate. This balance is composed in part of various items of rent of land collected by the adminis-

tratrix, and as to these the appellant claims that he was entitled to two-thirds and the administratrix to only one-third. This would be true if the land was a freehold estate; but it does not appear but that it was leasehold, and hence there is no error apparent on the face of the decree or final account. For the same reason, it is not shown that the repairs on the land were beyond the power of the administratrix. It is true that, taking the facts stated in the bill as to the nature of the title to the land as true, the error would be shown. But, in determining whether there is error on the face of the account, we cannot look beyond the decree and the account. The new matter alleged in the bill cannot be considered.

If the bill is considered as an original bill to set aside the decree allowing the final account, it cannot be maintained for two reasons: First, it was not brought during the minority of the appellant, or within the one year allowed by Code 1871, § 1265, in which he could apply for a rehearing; second, being brought after the year, there is no allegation of fraud or collusion in obtaining the decree. Within the one year, he would have been allowed to attack the decree by merely alleging error in it, pointing it out, and offering to show it by evidence *aliunde*. After that time, he stood in exactly the same relation to the decree as if he had been an adult, except that in making out a charge of fraud and imposition in obtaining the decree, some consideration would be given to the helplessness of the infant arising from his nonage and want of experience.

*Decree affirmed.*



### SARAH BATES v. PETER CROW.

1. ATTACHMENT. *Not a suit in personam. Plea to merits no waiver.*

Under the act of Feb. 21, 1878 (Acts 1878, p. 193), the doctrines of *Lewenthall v. Mississippi Mills*, 55 Miss. 101, are so changed that the attachment is a separate proceeding from the action for the debt, and the defendant may take issue on the latter without waiving his right to plead in abatement of the former.

57	676
d75	740
57	676
d77	820
a77	822
57	676
184	447

2. **SAME.** *Jurisdiction of Circuit Court. Return by constable. Alias writ.*  
If a constable returns an attachment writ to the Circuit Court, with a replevy bond for property which he has seized, it is improper to dismiss the proceeding *in personam*; and if the plaintiff asks for an *alias* writ, under the rule in *Barnett v. Ring*, 55 Miss. 97, the proceeding *in rem* should also be retained.

ERROR to the Circuit Court of Itawamba County.

Hon. J. A. GREEN, Judge.

*Blair & Clifton*, for the plaintiff in error.

The irregularity on the constable's part in taking the replevy bond affects neither the action nor the attachment proceeding. Acts 1878, p. 193. The most that could be done was to set aside the return. *Lawrence v. Featherston*, 10 S. & M. 345. Appearance and a plea to the merits gave jurisdiction, and the court should have proceeded to award a personal judgment, regardless of the disposition of the property made by the officer. *Jones v. Hunter*, 4 How. 342; *Henderson v. Hamer*, 5 How. 525; *Miller v. Ewing*, 8 S. & M. 421; *Harris v. Gwin*, 10 S. & M. 563; *Lester v. Watkins*, 41 Miss. 647; *Bishop v. Fennerty*, 46 Miss. 570; *Holman v. Fisher*, 49 Miss. 472; *Erwin v. Heath*, 50 Miss. 795; *Lewenthall v. Mississippi Mills*, 55 Miss. 101; Code 1871, § 1476.

No counsel for the defendant in error.

CHALMERS, J., delivered the opinion of the court.

An attachment writ for eleven hundred and fifty dollars, issued by a justice of the peace, was levied by a constable upon property valued at that sum, and the officer, instead of turning over the property and the writ to the sheriff of the county, as required by the statute, accepted from the defendant a replevy bond for the property, which, with the writ, he returned into the Circuit Court. Upon motion in that court the case was dismissed upon the ground that no jurisdiction had been acquired, inasmuch as the constable was not an officer of the Circuit Court, and could not by his return give it jurisdiction over the property seized. Whether this action was right or wrong under our previous statutes, and, there are utterances which seem to sanction either view (see, on the one hand, *Lawrence v. Featherston*, 10 S. & M. 345,

and, on the other, *Tucker v. Byars*, 46 Miss. 549, and *Barnett v. Ring*, 55 Miss. 97), it was certainly improper under the act of Feb. 21, 1878. (Acts 1878, p. 193.) The effect of that act, changing the doctrine announced in *Lewenthall v. Mississippi Mills*, 55 Miss. 101, is to make every attachment case virtually two suits,—one *in rem* and another *in personam*. In any point of view, therefore, it was erroneous to dismiss the entire case. The utmost that the court should have done was to dismiss the attachment proceeding; and even this would have been improper if the plaintiff had asked for the issuance of an *alias* writ of attachment, to be properly executed and returned, as was held in *Barnett v. Ring*, *ubi supra*. This may yet be done on the return of the case to the court below. The effect of the statute of 1878 is also to change the rule announced in *Lewenthall v. Mississippi Mills*, that the filing of a plea to the merits operates as a waiver of a plea in abatement to the attachment writ. The two proceedings now progress in a great degree independently of each other.

*Reversed and remanded.*

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WILLIAM FRENCH v. DAVID LADD.

1. TAX TITLE. *Auditor's deed. List of lands sold to State.*

The plaintiff in ejectment who relies upon a deed from the auditor must introduce the list of lands sold to the State, in order to show title.

2. SAME. *Evidence. Certified copy.*

A copy of so much of the list as relates to the land in question, accompanied by the auditor's certificate that everything shown by the list with respect to it is given, is admissible.

3. SAME. *Certificate of contents of list.*

The auditor's certificate that the land appears upon the original list as having been sold to the State on a given date for the taxes of a specified year is incompetent.

ERROR to the Circuit Court of Grenada County.

HON. SAM POWEL, Judge.

From a judgment in favor of the defendant in ejectment, the

plaintiff brings up the case, and assigns for error the exclusion from the evidence of the auditor's certificate.

*Fitz Gerald & Whitfield*, for the plaintiff in error.

The certificate by the auditor as to the contents of the list of lands on file in his office, which was the proper repository thereof, is full and in compliance with the law. *Fore v. Williams*, 35 Miss. 583; *Wray v. Doe*, 10 S. & M. 452. A copy of the entire list would often cost more than the land sued for is worth. So much as relates to the land in controversy is embodied in the certificate. The deed alone tended to make out the plaintiff's case, and the judgment for the defendant was improper, even after the certificate was excluded.

*A. J. Baker*, for the defendant in error.

A copy of so much of the list as related to the land in controversy, accompanied by a proper certificate, was essential in order to prove the plaintiff's title. *Clymer v. Cameron*, 55 Miss. 598; *Vaughan v. Swayzie*, 56 Miss. 704. Officers are not authorized to certify the substance of records. *Cockerel v. Wynn*, 12 S. & M. 117; *Foute v. McDonald*, 27 Miss. 610. Owing to the failure of proof the judgment must be affirmed. *Myrick v. McRaven*, 54 Miss. 11; *Jones v. Sherman*, 56 Miss. 559.

CHALMERS, J., delivered the opinion of the court.

The plaintiff suing on an auditor's deed was bound to produce a list of the lands sold to the State. In attempting to meet this burden, he offered in evidence a certificate by the auditor that the lots conveyed by the deed and sued for here "appear upon the original sales list as having been sold to the State on May 10, 1875, for the taxes of 1874." This certificate was properly excluded. It is a mere statement by the auditor of what he supposes that the records in his office show. His construction of those records is not competent evidence. He should give a duly certified copy of the record exactly as it remains on file, so that the court may judge of what it shows. It is not necessary to give the entire list or a copy of it, but only of so much of it as relates to the land in question, accompanied by a certificate that everything shown by the list with respect to it is given.

*Judgment affirmed.*

## T. W. BLAKELY v. THE STATE.

**DRUGGIST.** *Retailing liquor without prescription. Indictment.*

An indictment under the statutes against a druggist, for selling liquor without the prescription of a physician, must aver that he sold in less quantities than a gallon.

ERROR, to the Circuit Court of Lee County.

Hon. J. A. GREEN, Judge.

The motion of the plaintiff in error to quash the indictment against him upon the ground that it failed to aver that the liquor was sold in less quantities than one gallon was overruled, and he was tried and convicted.

*J. M. Allen and Blair & Clifton*, for the plaintiff in error.

A druggist's right to sell liquor is based on Code 1871, §§ 2456, 2463, which is not repealed by the act of April 17, 1873 (Acts 1873, p. 102), or the act of March 5, 1878 (Acts 1878, p. 16). Any one can sell by the gallon if he has a license.

*T. C. Catchings*, Attorney General, for the State.

CAMPBELL, J., delivered the opinion of the court.

Sect. 2456 of the Code, and "An act to regulate the sale of spirituous liquors by druggists," approved April 17, 1873 (Acts 1873, p. 102), and that part of "An act to regulate the tax on privileges and to provide a uniform license system," approved March 5, 1878 (Acts 1878, p. 12), which applies to the sale of vinous or spirituous liquors by druggists, all have reference to sales by druggists of less quantities than one gallon. Any person could sell vinous or spirituous liquor in quantities of one gallon or more, after paying the privilege tax of fifty dollars and obtaining the privilege license required by the act of March 5, 1878, recited above. A druggist could lawfully do this and sell by the gallon or more, as any other person, but he could not lawfully sell as a druggist smaller quantities than one gallon without the prescription of a physician. The indictment should have been quashed, because it does not aver that the party sold less than a gallon.

*Judgment reversed and indictment quashed.*

## E. H. COGBURN v. MARGARET HUNT.

57	681
192	467

1. TAX SALE. *Rights of purchaser. Failure to sell at auction.*

The purchaser of a tax title from the State can charge the land under Code 1871, § 1718, if it is in the list of lands sold to the State, although the tax collector, under an agreement with the owner, does not offer it on the sale-day with other lands.

2. SAME. *Refunding the purchase-money. Charging the land.*

Except in the state of case provided for by Code 1871, § 1719, where the State and county refund the money received by them respectively, the purchaser of land sold for taxes, if from any cause he fails to get title, may charge the land.

ERROR to the Chancery Court of Warren County.

Hon. UPTON M. YOUNG, Judge.

*Nugent & McWillie*, for the plaintiff in error.

The omission to offer the land for sale, under the circumstances of this case, cannot affect the appellant's right to charge it under Code 1871, § 1718. The land was sold to Cogburn by the State, and the claim for taxes and damages results from Hunt's non-payment. *Cogburn v. Hunt*, 56 Miss. 718. The absence of a sale to the State cannot affect the question. This court, in its former opinion, decided that the conveyance to the State was a nullity. The title was void, and could not be made worse by the absence of an auction. Cogburn is a purchaser at a tax sale, and entitled to the protection of the statute.

*W. L. Nugent*, on the same side, argued orally.

*Miller & Hirsh*, for the defendant in error.

The land was never sold for taxes to the State, and Code 1871, § 1718, does not apply. The former opinion in this case (*Cogburn v. Hunt*, 56 Miss. 718) implies that no defect in a tax sale can exist which the statute does not cover. But this is a case in which there is no tax sale. Both the statute and the opinion are by their terms applicable only to cases in which there has been a sale. To apply the statute to this case will be judicial legislation. Clearly the statute does not contemplate the absence of the sale.

*W. P. Harris*, on the same side, argued orally and in writing.

The position now taken by counsel, that a sale by the State is a tax sale within the meaning of Code 1871, § 1718, whether there was ever, in fact, a tax sale by the collector or not, is clearly untenable. It is questionable whether the section applies to a purchaser from the State; but obviously, if it be held to apply to sales by the State, it must be confined to cases where the State is a purchaser at the collector's sale. The section was intended to apply to omissions as to the manner, time and place of sale, and the proceedings to make the assessment effectual, such as its due return and the appropriate action thereon. The objection here does not arise from the revenue law. It is founded in the law governing transfers of land, and the general law of evidence. It is not that the alleged sale was defective, but that there is no evidence of any sale. The list of sales certified is of no higher dignity than a deed. It is *prima facie* evidence of a sale according to law, if otherwise it shows a sale of any land, but it is *res inter alios acta* as to the owner of the land who is not a party to it or bound by its recitals. 2 Wharton Evid. § 1039. It is admitted that there never was a sale. To subject the land to a claim founded on the statutory lien would be a departure from all precedent, and do violence to the statute.

CAMPBELL, J., delivered the opinion of the court.

The lot of Mr. Hunt was subject to taxation. It was not exempt. An effort was made to subject it to taxation, but it was insufficiently described to make the assessment and sale of it valid. Therefore, the title could not pass by a sale for taxes. *Cogburn v. Hunt*, 54 Miss. 675. But § 1718 of the Code entitles the purchaser at any sale for taxes, who does not get title to the land, to charge it with a lien for what he pays and other charges specified in the statute. It is not a subrogation of the purchaser to the right of the State. It is a statutory right to go against the land to which the purchaser gets no title. Because he fails to get title, he may charge the land, not as merely substituted to the right of the State as to the land, but in order that he may be reimbursed, the statute gives him a right as against the land. If the purchaser were



merely substituted to the right of the State, and the State had none, by reason of a failure of the assessment, he would have no right as to the land.

It is true that, in order to effect justice, a court of equity may apply the doctrine of subrogation, as based on the statute, as in *Ingersoll v. Jeffords*, 55 Miss. 37; but the statute confers a right on the purchaser as to the land, by virtue of the fact that he purchased at a sale for taxes and failed to get title. If land is liable to taxation, and an attempt is made to tax it, and the taxes are not paid, and it is sold for taxes, and the purchaser, from any cause, fails to get title, § 1718 of the Code applies. It matters not why the sale may be invalid, the statute entitles the purchaser to charge the land, except in the state of case provided for by § 1719 of the Code, in which case he must look to the State and county, if the taxes were paid into their treasuries. *Cogburn v. Hunt*, 56 Miss. 718.

There was, in fact, no offering of the lot for sale at public outcry, because Hunt requested the collector not to sell it, promising to pay the taxes claimed on it in a short time. He failed to pay, and the land was conveyed by the collector to the State, by being placed in the list of lands reported as knocked off to the State at the sale for taxes, and the appellant purchased the lot from the State, which sold on the faith of the record. Hunt's title did not pass to the State, because the requirements of law, as to the manner of making a sale of land for taxes, were not observed; but the land was liable to taxation, and was sought to be subjected thereto, and taxes were claimed, and Hunt recognized the claim, and caused the lot to be withheld from exposure for sale to the highest bidder. He failed to pay the taxes, and the lot was listed as sold to the State. He reposed upon this state of things. The State sold and conveyed the lot to the appellant, who purchased on the faith of the record, made up as we have stated. A sale was made as evidenced by the list, which is a conveyance to the State. Offering land at auction is a *mode* of selling. Hunt was responsible for the failure to pursue the mode prescribed by law for selling. One of two must suffer. The appellant should not. The statute secures his rights.

*Decree reversed and cause remanded.*

## LOUIS JONES v. THE STATE.

1. JURORS. *Competency. Capital punishment. Scruples.*

A juror who will not, on circumstantial evidence, convict a murderer to be hanged, may be rejected by the court in a case depending upon evidence of that character, although he will convict and send to the penitentiary for life.

2. CIRCUMSTANTIAL EVIDENCE. *Murder. Threat.*

A threat to kill is insufficient of itself to warrant a conviction of murder, although the killing is soon afterwards done and no other perpetrator is disclosed by the evidence.

ERROR to the Circuit Court of Wilkinson County.

Hon. J. B. CHRISMAN, Judge.

The plaintiff in error was convicted of murder on circumstantial evidence, and sentenced to be hanged. Notwithstanding his objection, several jurors were rejected by the court because they stated that they would not convict a man to be hanged on circumstantial evidence, but if satisfied of guilt would send him to the penitentiary for life. On Monday the plaintiff in error said he would kill Ira Anderson if his mistress went to live with him. She went on Tuesday, and that night Anderson was assassinated while sitting in his door. The ninth charge asked by the prisoner and refused was, "that although the jury may believe, from the evidence, that the defendant threatened to take the life of Ira Anderson, yet this is but a circumstance in the case, and is not sufficient of itself to warrant a conviction, although it may not appear from the evidence that any other particular person committed the homicide." The tenth was the same to the word "conviction," after which was substituted this language: "but is to be weighed and considered with all the other testimony in the case."

*D. C. Bramlett and T. V. Noland*, for the plaintiff in error.

The accused had a right to the rejected jurors, which could not be overcome except by a peremptory challenge by the State. *Russell v. State*, 53 Miss. 367; *Smith v. State*, 55 Miss. 410. The charges were improperly refused. A threat is but

a circumstance, but if not cautioned, the common mind, in a case like this, accepts it as proof of guilt.

*T. C. Catchings*, Attorney General, for the State.

The jurors were not competent in a murder case. Without unanimous consent the prisoner, if convicted, would have to be hanged, and the rejected jurors' scruples would prevent a verdict. Since the jury had been told to make up their verdict from the whole evidence, the instructions refused would have added nothing to their understanding the case, and would have confused and misled them.

CAMPBELL, J., delivered the opinion of the court.

The court ruled correctly as to the competency of jurors. The punishment prescribed by law for murder is death by hanging. The jury finding a verdict of guilty of murder may fix the punishment at imprisonment for life. The law deems circumstantial evidence sufficient to warrant a verdict of guilty of murder, and a juror who is not willing to pronounce a verdict of guilty of murder on sufficient circumstantial evidence, to be followed by the sentence of the law in such case, is not such a juror as the law requires for the trial of an indictment for murder.

The ninth and tenth instructions asked by the prisoner are correct as legal propositions, and were exceedingly appropriate to the facts in evidence, and refusing them constitutes an error for which the judgment is

*Reversed and cause remanded.*

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### GEORGE W. TIPLER v. THE STATE.

#### 1. CARRYING CONCEALED WEAPONS. *Threatened with an attack.*

The exception in the statute to prevent the carrying of concealed weapons (Acts 1878, p. 175), in favor of a person "threatened" with an attack, does not contemplate mere denunciation, but menace such as to cause a reasonable apprehension of an attack that would properly be resisted with that kind of a weapon.

2. **SAME.** *Reasonable apprehension. Question for jury.*

Whether the accused carried the weapon because of apprehension justly and honestly entertained on good and sufficient reason, is a question for the jury, and an instruction, which announces the negative as a legal conclusion, is erroneous, although it recites the facts of the case which tend to that conclusion.

ERROR to the Circuit Court of Tiptah County.

Hon. J. W. C. WATSON, Judge.

George W. Tipler, who lives at Tiplersville, fifteen miles from a station on the Memphis and Charleston Railroad, was on the fourth of July, 1879, at Wolf's Spring, seven miles from the station, with a pistol partially concealed on his person. One Sherold, a brakeman on the railroad who was in the habit of making two trips a week from Burnsville to Memphis, often inquired for Tipler at the station, and uttered threats respecting him of serious personal injury. On the trial of the indictment for carrying a concealed weapon, the court charged the jury for the State that, if the defendant Tipler carried the pistol concealed in whole or in part, he was guilty, and could not justify it upon the ground of the brakeman's threats made while employed on the railroad and making two trips a week from Burnsville to Memphis, when the defendant lived fifteen miles from the railroad, and carried the pistol seven miles distant from the station where the threats were made; and refused to instruct for the defendant, that, if at the time he was charged with carrying the weapon, he had been threatened with, or had good and sufficient reason to apprehend, an attack from Sherold, he had the right to carry arms concealed and should be acquitted. Tipler was convicted, his motion for a new trial was overruled, and he sued out this writ of error.

*Falkner & Frederick*, for the plaintiff in error.

The jury under proper instructions should have been permitted to decide whether the defendant had brought himself by his proof within the exception as to persons "threatened" contained in the statute. Acts 1878, p. 175. Power to pass upon the sufficiency of the evidence did not rest in the court. *Wesley v. State*, 37 Miss. 327; *Hogsett v. State*, 40 Miss. 522. Acquittal was proper if the jury entertained a reasonable

doubt of guilt. *Pollard v. State*, 58 Miss. 410. The charge asked for the accused should have been given, because it announced a correct principle and was applicable to the evidence. *Nichols v. State*, 46 Miss. 284.

*T. C. Catchings*, Attorney General, for the State.

Under the Act of February 28, 1878 (Acts 1878, p. 175), the burden was on the accused to prove that he was carrying the pistol under circumstances which authorized him to do so. He so signally failed to do this that his attempt can only be characterized as a farce. Under the facts of the case, it was next to impossible for the court to commit an error which would entitle Tipler to a reversal. The verdict is so clearly right that argument cannot strengthen the case for the State.

CAMPBELL, J., delivered the opinion of the court.

The instruction to the jury, given at the request of the district attorney, is erroneous in assuming, upon a state of facts recited by it, that the defendant had not sufficient reason to apprehend an attack. This was an invasion of the province of the jury. It was for it to consider all the evidence, and determine whether the defendant was threatened with an attack or had good and sufficient reason to apprehend one, and was carrying the pistol he had on his person partly concealed because of such reasonable apprehension, and as a proper precaution for his protection against such threatened attack. If such was the case, he was not within the prohibition of the statute; but, if he had no sufficient reason to apprehend an attack, he could not shield himself from the penalty of the law because of some threat made against him, unless it was made by a person and under circumstances which the jury should consider sufficient to cause the defendant justly to apprehend that there was such danger of being attacked as to make it proper to bear arms in self-defence at the time he is shown to have done so.

The expression in the statute "being threatened" is used in the sense of being so circumstanced as to be made to apprehend an attack against which one might lawfully defend himself by the use of a deadly weapon. The term "threatened" in the statute does not mean that a mere denunciation

of evil will license the person denounced to carry concealed weapons. The person excepted from the prohibition of the statute is one so menaced as to have good reason to believe that he is in danger of an attack from which he may properly defend himself by the character of weapon he carries concealed. The statute permits one justly apprehensive of attack to provide against it by carrying weapons concealed, but apprehension must not be simulated or too easily excited; and idle threats, the ebullition of passion, or the offspring of intoxication, which import no serious danger, must not be made a pretext for carrying concealed weapons, which is permitted only to him who has "good and sufficient reason to apprehend an attack."

It is for the jury to determine from the evidence whether the accused carried the weapon because of apprehension justly and honestly entertained of danger of attack, or whether the apprehension of an attack, claimed as a justification for carrying a weapon concealed, is founded on good and sufficient reason, or is made a pretext for a violation of the law. The vice of the instruction we have pronounced to be erroneous is that it announces as a legal conclusion, in effect, that the accused could have no good and sufficient reason to apprehend an attack from Sherold, if the latter was and continued to be a brakeman on the Memphis and Charleston Railroad, making two trips a week from Burnsville to Memphis, and the accused lived fifteen miles from this railroad, and was carrying the weapon concealed seven or eight miles from the railroad. Certainly, if Sherold should not depart from the railroad, and the accused should not go to it or near it, there would be no danger of collision between them, but it may be true, so far as the evidence shows, that Sherold continued a brakeman, and made two trips a week from Burnsville to Memphis, and yet, he might, on the fourth of July, have been at Wolf's Spring, a distance of seven or eight miles from the railroad, on which he made two trips a week, as stated. It should have been left to the jury, under instruction as to the principles of law to guide them, to say whether the accused was menaced with harm, and had good reason to believe himself in such danger of attack on July 4, 1879, as to excuse him for having con-

cealed on his person a pistol at Wolf's Spring. It is not to be supposed that the jury would have failed to make the proper response to the inquiry.

The instruction asked by the accused was properly refused, because it contains the idea, repudiated in this opinion, that, if the accused had been threatened with an attack, he had the right to carry a weapon concealed. A declaration of intention to do some harm to another, which is the ordinary meaning of a threat, often signifies very little, and, as before stated, it is not of a threat, in this sense, that the statute speaks. That one has been threatened by another with bodily harm does not in itself license the person threatened to carry a weapon wholly or partly concealed. To justify it, he must, in the opinion of the jury, have good and sufficient reason to apprehend an attack, and must be carrying the weapon charged as a precaution against it, and must not carry it at a time or place or under circumstances in which he could not have sufficient reason to apprehend an attack, of all which the jury trying the case is to determine, as a question of fact.

*Judgment reversed and new trial awarded.*

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M. J. COCKE v. A. L. BLACKBOURN.

**PROMISSORY NOTE. Consideration. Parol evidence.**

The real consideration for a sealed note, as distinguished from the expressed consideration, may be shown by parol evidence in a suit thereon.

**ERROR to the Circuit Court of Tate County.**

Hon. SAM POWEL, Judge.

*Shands & Johnson*, for the plaintiff in error.

Parol evidence is admissible to show the real consideration of a bill single, whether any is expressed in the writing or not. *Lee v. Dozier*, 40 Miss. 477; *Blackwell v. Reid*, 41 Miss. 102; *Marshall v. Hamilton*, 41 Miss. 229. It has never been seriously denied that the consideration of a writing can be inquired into when the instrument itself does not express

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71	870
57	689
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its consideration. 1 Dan. Neg. Inst. § 163. Under Code 1871, § 605, the consideration of sealed instruments can be impeached like other written instruments. It is well settled that the fullest inquiry may be made into the consideration of written instruments. 1 Greenl. Evid. §§ 285, 304. In *Buckels v. Cunningham*, 6 S. & M. 358, this doctrine is forcibly and lucidly asserted. In *Marsh v. Lisle*, 34 Miss. 173, a wholly different consideration was proved by parol. 1 Dan. on Neg. Inst. § 162. Outside of our State the same doctrine has been often announced. *Holmes's Appeal*, 79 Penn. St. 279; *Taylor v. Preston*, 79 Penn. St. 436; *Buckley's Appeal*, 48 Penn. St. 491; *Fort v. Orndoff*, 7 Heisk. 167; *Laudman v. Ingram*, 49 Mo. 212; *Donley v. Tindall*, 32 Texas, 43; *Perry v. Smith*, 34 Texas, 277; *Bonney v. Morrill*, 57 Maine, 368; *Lawton v. Buckingham*, 15 Iowa, 22; *Frey v. Vanderhoof*, 15 Wis. 397; *Wynne v. Whisenant*, 37 Ala. 46; *Thomas v. Barker*, 37 Ala. 392.

*Oglesby & Taylor*, for the defendant in error.

The bill single would preserve none of its features but the names of the parties, if all the matters in the plea were annexed to it as part of its terms. This brings the case under the rule that excludes all evidence of a contemporaneous, verbal understanding or agreement, the effect of which would be to contradict or vary the written instrument, as the contract of the parties. Stark. Evid. 648; 1 Greenl. Evid. § 275; 1 Chitty on Contracts, 108; Parsons on Notes & Bills, 501; Story on Contracts, §§ 669, 671, n.; 1 Dan. on Neg. Inst. § 80. A contract cannot rest partly in parol and partly in writing. 1 Waite's Actions & Defences, 131; *Herndon v. Henderson*, 41 Miss. 584; *Wren v. Hoffman*, 41 Miss. 616; *Dixon v. Cook*, 47 Miss. 220. Where the consideration is expressed, parol evidence will not be admitted to show a greater or different consideration. 1 Chitty on Contracts, 25; *Powell v. Jones*, 12 S. & M. 506. It cannot be shown that the sum agreed to be paid was different, or that an additional sum was to be paid in a certain contingency. Dan. on Neg. Inst. § 81. Parol evidence is not admissible to annex a condition to an absolute promise in the form of a promissory note. *Allen v. Furbish*, 4 Gray, 504; 1 Greenl. Evid. § 281.



CAMPBELL, J., delivered the opinion of the court.

The question raised by the demurrer to the plea, and discussed by counsel is, Whether the consideration expressed in the bill single sued on precludes the obligor from showing by parol an additional and different consideration? We consider it well settled that the real consideration of a note may be shown by parol, whatever may be the statement of the note as to the consideration. If this were not so, all inquiry could be shut out by the easy process of stating the consideration in every note to be gold coin or other equally unassailable consideration, and then the defence of illegality, or want or failure of consideration would be unknown, to the great relief of courts, but at the expense of justice between parties litigant. In *Pollen v. James*, 45 Miss. 129, the promissory note sued on contained the statement, that it was given in consideration of "money loaned." A plea that its real consideration was a slave sold to the maker and warranted to be sound, and that the warranty was broken, was held to be good on demurrer. This case is well supported by authority, and announces the true doctrine on this subject. Wharton Evid. §§ 928, 1044; *Pierce v. Woodward*, 6 Pick. 206; *Butler v. Smith*, 35 Miss. 457. Under our statute, Code 1871, § 605, there is no difference, in this respect, between sealed and unsealed instruments. In *Meyer v. Casey*, ante, 615, we held it to be admissible to assail an instrument under seal by showing by parol evidence the real consideration to be different from that expressed, and that it had failed. It is always allowable to show that the instrument sued on never was valid, either for fraud or illegality, or want of consideration, or for failure of some condition on which the instrument was to take effect; or that, having been valid, from something occurring subsequently, it has ceased to be operative wholly or partially. It is not admissible to vary the terms of a valid written instrument by parol; but it is allowable to attack the instrument, and seek to overthrow it as never valid or having ceased to be. The distinction is between the promise and its consideration, between the obligation and that which supports it. The former cannot be altered by parol. The latter may be. The terms of an obligation assumed to be valid, cannot be varied by parol; but it may be

shown by parol what caused the party to thus oblige himself. That consists with the written obligation, and does not vary it. The right to show the real consideration is a qualification of the general rule of the inadmissibility of parol evidence to alter the terms of a written contract, and is as well established as the rule itself. *Barker v. Prentiss*, 6 Mass. 480. What I bind myself by writing to do, cannot be varied by parol; but I may always show by parol what induced me to thus bind myself, and thereby test the question whether I was legally bound, as the writing imports, or whether I have been, by any cause, wholly or partially freed from my obligation.

The facts stated in the plea demurred to, consist with the bill single sued on, except in its statement of its consideration; and, as we have stated, that may always be varied by parol. The substance of the plea is, that while the bill single was given, as it states, for the plaintiff's stock of merchandise, a further inducement to the defendant to make the purchase and execute the writing obligatory, was the promise of the plaintiff to give the defendant the advantage of his trade, in buying from the defendant to the amount of the bill single, and to influence his friends to purchase goods of the defendant, and that he would not rival the defendant in business for a certain period, and that the plaintiff had violated his promise in all these particulars, wherefore the consideration of the bill single has failed. In all this the terms of the obligation are not sought to be varied; but, in entire harmony with the promise to pay one day after date the sum expressed, the plea sets up, as independent of the instrument, a material inducement to the obligor to execute it in the obligation assumed by the plaintiff and violated by him. The demurrer was aimed alone at the admissibility of facts, to be shown by parol, to vary the statement of the writing as to its consideration. That is the only question discussed by counsel, and to that we have confined ourselves.

*Judgment sustaining demurrer to plea reversed  
and cause remanded.*

## W. J. AZLIN v. W. S. LAKE.

DEBT ON BOND. *Breach of condition. Wrongful issuance of attachment.*

A declaration in debt on a bond conditioned to pay such damages as the defendant in attachment shall sustain by its wrongful issuance must aver that the attachment was wrongfully sued out.

ERROR to the Circuit Court of Grenada County.

Hon. SAM POWEL, Judge.

The demurrer of the defendant in error was sustained to the declaration of the plaintiff in error, which was in debt on a bond for attachment, sued out by Miller & Justi against the latter, with the former as surety. The breach assigned was that L. A. Azlin claimed the goods levied on, and subsequently it was adjudged by the court that the goods be discharged from the levy, the attachment dismissed, and the defendant "go hence without a day," and that Miller & Justi have not prosecuted their attachment with effect, or paid the plaintiff in error the damages sustained by reason of its wrongful issuance.

*A. H. Whitfield*, for the plaintiff in error.

The breach of the condition of the bond is sufficiently averred. Miller & Justi have failed to prosecute their writ with effect, and are bound for such damages as the levy occasioned. *Holcomb v. Foxworth*, 34 Miss. 265.

*J. M. Ellis*, for the defendant in error.

The declaration must aver that the attachment was wrongfully sued out. *Drake on Attachment*, § 167. It is insufficient to negative the language of the condition of the bond. *Baggett v. Beard*, 43 Miss. 120; *Butler v. Alcus*, 51 Miss. 47.

CAMPBELL, J., delivered the opinion of the court.

The bond is conditioned to pay such damages as the defendant in attachment should sustain by reason of the wrongfully suing out of the attachment. The declaration does not aver that the attachment was wrongfully sued out. This is a necessary averment. The discharge of the goods claimed by a third person from the levy of the attachment and the dismissal of the attachment consist with the rightfulness of its issuance. The wrongfulness of its issuance should have been averred.

*Judgment affirmed.*

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188	100

EMMA S. COOPER ET AL. v. THOMAS H. ALLEN ET AL.

1. CHANCERY PLEADING. *Amendment. Statute of Limitations.*

If the period of the bar of the Statute of Limitations elapses pending a bill to foreclose a married woman's mortgage for plantation and family supplies, which is afterwards decided to be void, an amended bill can be maintained to enforce the statutory charge for the supplies.

2. MARRIED WOMAN. *Separate estate. Statutory charge.*

Plantation and family supplies furnished a wife, on her personal application and that of her husband with her consent, are a charge upon her separate estate, although the merchant accepts the husband's note, and a void mortgage made by him and his wife as security.

APPEAL from the Chancery Court of Bolivar County.

Hon. W. G. PHELPS, Chancellor.

The original bill was filed Dec. 16, 1868, to foreclose a mortgage executed by Emma S. Cooper and her former husband to secure his notes, one for three thousand dollars, due Oct. 25, 1866, and the other for a larger sum, given, as was alleged, for plantation and family supplies, wearing apparel, furniture, and buildings on her land. Upon a former appeal (*Allen v. Lenoir*, 53 Miss. 321), the mortgage was declared void for want of acknowledgment by the married woman, and the case was remanded in order that the Allens might amend their bill and litigate with Mrs. Lenoir as to her liability by virtue of the dealings between the parties, independently of the mortgage. An amended bill was accordingly filed May 16, 1877, which alleged that plantation and family supplies having been furnished to the amount of the larger note, and the Allens refusing to continue advancing without security, Lenoir, who owned nothing, and managed his wife's business, gave his two notes, the smaller for future advances, and the void mortgage was executed; that in April, 1867, Mrs. Lenoir came to Thomas H. Allen, one of the firm, and by representations that she would lose her crop without further advances, induced them to furnish further supplies to Mr. Lenoir, it being understood that the smaller note was to stand as collateral security for any balance which might be finally due on account, and that, up to

Dec. 13, 1867, they advanced more than six thousand dollars over their receipts from the plantation. The appellants answered setting up the Statute of Limitations, and denying that the items of the account were a charge under the married woman's law. Having eliminated from the account every thing not shown by proof to be a charge under the statute, the Chancellor decreed subjecting the land to an amount measured by the smaller note.

*T. J. & F. A. R. Wharton* and *F. A. Montgomery*, for the appellants.

1. Leaving out of view the note and mortgage, the latter of which was declared void upon the former appeal (*Allen v. Lenoir*, 53 Miss. 321), the debt which the amended bill is filed to enforce cannot be charged upon the married woman's separate estate, because it was not contracted for any of the purposes contemplated by the married woman's statute (*Viser v. Scraggs*, 49 Miss. 710), and also because all remedy to enforce it is barred by the Statute of Limitations. The supplies were furnished, and the husband's note given, more than six years before the amended bill was filed. The amended bill cannot be maintained upon the theory that it is the same cause of action as the original bill, because the note involved therein has been paid. *Neal v. Allison*, 50 Miss. 175; *Windsor v. Kennedy*, 52 Miss. 165; *Ogden v. Harrison*, 56 Miss. 743; 1 Dan. Ch. Prac. 852. The attempt to consider the husband's note as an account stated is a failure. *Klotz v. Butler*, 56 Miss. 333, is unlike this case. Here the note was given *before* the advances were made. Mrs. Cooper is not estopped either by her own statements or those of her husband to show that the money thus loaned was not used upon her plantation, as held in *Wright v. Walton*, 56 Miss. 1; she does not bind her estate for payment thereof, even though she states, at the time of borrowing, that it is obtained to be expended for the support of herself and family, or for supplies for her plantation, if she does not actually use it for such purposes. In order to bind her estate, in such case, it must appear that the money was used for some purpose for which she could contract under the statute. A note for future supplies for the wife's plantation and the family does not bind her.

*Nugent & McWillie*, for the appellees.

When this case was reversed, it was remanded to enable the appellees to litigate with Mrs. Lenoir as to her liability "by virtue of the dealings between the parties." *Allen v. Lenoir*, 53 Miss. 321. That is an adjudication full and complete. Why remit the parties to this right if they were to be met with a plea of the Statute of Limitations? The case, however, is controlled by *Barnett v. Nichols*, 56 Miss. 622. The defendant will not be permitted to add to the bad faith charged against her by setting up the Statute of Limitations against the debt. In a court of equity the complainants are compelled to amend their bill in a proceeding begun in 1868. The amended bill is a mere continuation of a suit then commenced. The right of action may well be said to have arisen when the original bill was decided not to be maintainable because of the plea that the clerk's certificate of acknowledgment was a forgery. Nothing but the coverture of Mrs. Cooper enabled her to interpose that plea under the peculiar circumstances of the case, and that coverture cannot be converted now into an engine of oppression. *Klotz v. Butler*, 56 Miss. 333, settles this case. Mrs. Lenoir gave up to her husband full control of her property, and acquiesced in every thing he had done and was doing. When he failed, she supplemented his efforts and procured additional supplies.

CAMPBELL, J., delivered the opinion of the court.

The opinion of this court delivered in this case at a former term is contained in 53 Miss. 329 *et seq.* Afterwards, the complainants exhibited their amended bill, averring the liability of the separate estate of Mrs. Lenoir, now Mrs. Cooper, not by virtue of the mortgage, which had been pronounced to be void as to her, but because of the dealings had between the complainants and Mr. Lenoir. The bill, as amended, brings the case within the principle of the case of *Guion v. Doherty*, 43 Miss. 538, repeatedly followed in this court, and the evidence maintains the amended bill. The original bill was filed Dec. 16, 1868, and the amended bill was exhibited May 16, 1877. The Statute of Limitations is pleaded against the demand of the amended bill. The Chancellor maintained

this demand to the amount of three thousand dollars, because, to that amount, it was asserted in the original bill, which was filed in December, 1868. The excess of the claim over three thousand dollars, not being demanded by the original bill, was held to be barred by the time elapsed before the exhibition of the amended bill. Counsel for the appellants lay stress on the fact that the note was paid by credits admitted by the appellees. This may be true, and it does not affect the right of the complainants to recover on their account to the extent that it is not barred by lapse of time.

The gist of the amended bill is that the complainants are entitled to charge the separate estate of Mrs. Lenoir, because of the purchases made by her husband, in the manner and under the circumstances detailed by the bill. The answer denies the allegations of the bill as to the liability of the estate of Mrs. Lenoir, and relies on the lapse of time, as a bar to the claim against her estate, if it ever was liable. We think the bill is maintained by proof, as we have before stated; and the answer to the defence of lapse of time is, that to the amount of three thousand dollars, the demand of the complainants was asserted in their original bill, and although the amended bill was exhibited in 1877, the claim asserted by it is the very one asserted originally, and the amendment in the statement of the claim, and the relief sought in the varied statement of the demand are to be viewed as if embraced in the original bill.

*Decree affirmed.*

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WOOD RITTENHOUSE ET AL. v. ANTOINETTE LEIGH.

1. PARTNERSHIP. *Married woman. Holding herself out as partner.*  
*Quære*, Is a married woman, who holds herself out as a member of a commercial firm, liable for firm debts, when not an actual partner.
2. SAME. *Use of married woman's name against her consent.*  
If, on hearing that the firm is using her name, she forbids it, and never hears that her prohibition is violated, she is not estopped thereby to deny that she is a partner.

ERROR to the Circuit Court of Grenada County.

Hon. SAM POWEL, Judge.

*W. C. McLean*, for the plaintiffs in error.

1. It was decided by the circuit judge that, in order to hold a married woman liable for a partnership debt, it is necessary that she be actually a partner, or, in other words, she is not liable if she is only a nominal or ostensible partner. This construction of our statute is erroneous, inconsistent with justice, and opposed to the adjudications of some of the most learned tribunals in the land. The reason upon which a nominal or ostensible partner is held liable for the debts of the firm is not that he has any actual interest in the partnership funds or profits, but because he has allowed his name to be held out to the world as a partner, and that, by reason of such holding out, persons have given credit to the firm. This is to preserve good faith and to prevent fraud, and it has been said to be almost the only ground of an estoppel *in pais*. The doctrine of estoppel applies to married women. *Levy v. Gray*, 56 Miss. 318; *Shivers v. Simmons*, 54 Miss. 520. In the recent changes in the common law, effected by statute, whereby married women have been given the power to make contracts and control property independently, it is not very clear how far the law of torts has been modified. We should probably be safe in saying that, so far as they give validity to a married woman's contracts, they put her on the same footing with other persons, and, when a failure to perform a duty under a contract is itself a tort, it may doubtless be treated as such in a suit against a married woman. *Cooley on Torts*, 118. The tendency of legislation, guided by lessons of experience and enlightened judgment, is to a larger freedom from the common-law disabilities of coverture. Where the legal capacity exists, the contract stands upon the same footing as if she was unmarried. *Netterville v. Barber*, 52 Miss. 168; *Newman v. Morris*, 52 Miss. 402. She is liable for fraudulent representations when she is the purchaser of goods. *Baum v. Mullen*, 47 N. Y. 577. Under Code 1871, § 1780, a *feme covert* has the unqualified right and power to engage in trade or business; and it is well settled that she may be estopped by her acts and declarations in all matters in respect to



which she is capable of acting *sui juris*. *Nash v. Mitchell*, 71 N. Y. 199. *Bodine v. Killeen*, 53 N. Y. 93, holds that she is bound by the appearance of being a partner. To the same effect is the case of *Bitter v. Rathman*, 61 N. Y. 512, in which the court said that the defendant (a *feme covert*) having suffered herself to be regarded by the public as a partner was liable to the creditors of the ostensible firm. So, also, is the case of *Scott v. Conway*, 58 N. Y. 619, in which the court held that a married woman carrying on a separate business is held to the truth of the appearance. The same doctrine is announced in 2 Bishop on Married Women, §§ 490, 495, 442 note. The statute giving power to engage in trade or business gives by implication the power to enter into a partnership, and the contracts of the firm are her contracts. *Newman v. Morris*, 52 Miss. 402; 2 Bishop on Married Women, §§ 236, 442, 436; *Plumer v. Lord*, 5 Allen, 460, 462.

2. When Mrs. Leigh ascertained that her name was on the letter-heads, it was her duty to take such steps to notify the public that she objected to that use of her name, as an honest, cautious and prudent man would have done under similar circumstances, and unless she did that she is liable. This will scarcely admit of argument. Parsons Part. 134, 135, 146, 147. Indeed, if she neglected to give public and notorious notice, she is liable. *Polk v. Oliver*, 56 Miss. 566, is decisive of this proposition. If a person knows that his name is used, and neither consents or refuses, then he is to be held as consenting; and when he does anything which might fairly produce this impression, or when another does this, and he fails to do what he should to prevent the impression that he is a partner, then he is as much liable as if he called himself a partner. The penalty is as great for acts of omission as for those of commission. Parsons Part. 134, 146, 147, notes 31, 33.

*G. Y. Freeman*, for the defendant in error.

1. A married woman cannot, under Code 1871, § 1780, be bound as a partner, unless she is or has been a member of the firm. The statute, which enables a married woman to bind her separate property in a few certain and specified modes, is in derogation of the common law, and the meaning cannot be extended. It must be conceded that, save when she is enabled

by statute to make an executory contract, she is powerless. We must then look to the statute to find the power. Mrs. Leigh has never actually engaged in "trade or business as a *feme sole*." She was never a member of the firm. How is it possible then to find the power to bind her in that statute, which says that, when she does engage in business as a *feme sole*, she may be bound upon contracts, provided such contracts are made in the course of such trade or business? The case of *Wright v. Walton*, 56 Miss. 1, settled this. The court say that she must have a plantation before she or the husband can make a supply contract. Her plantation is the predicate of the power to make the contract. A false representation that she has such property will not estop her from averring that the fact was otherwise, because her capacity to contract is dependent upon the actual ownership of the plantation, and she cannot be held liable for any misrepresentation, or estopped to deny a contract which she was powerless to make. That the married woman must be an actual partner to be bound is again clearly recognized in *Magruder v. Buck*, 56 Miss. 314, where the court pronounced a judgment against a married woman void, because the declaration on which it was rendered described the married woman as "doing business as a *feme sole*," and did not aver that she was "engaged in trade or business as a *feme sole*."

2. If the principle were applicable to married women, it could not avail the plaintiff in error. Mrs. Leigh did not permit her name to be held out as a member of the firm. On the contrary, she forbade its use as soon as she heard that it was on the letter-heads. She had no knowledge that her name was used afterwards, and cannot be held for subsequently contracted debts. Knowledge and implied consent are essential. No public notice was required. *Parsons Part.* 144-146, 132, 134. The principle announced in the case of *Polk v. Oliver*, 56 Miss. 566, is inapplicable here. Mrs. Leigh was not a retiring partner. The wife would have little protection from the married woman's law, if her husband could bind her for his debts by the unauthorized use of her name.

*FitzGerald & Whitfield*, on the same side, filed a brief upon the facts, contending that Mrs. Leigh did every thing possible

to prevent an imposition upon the public, and that she would not, even if a *feme sole*, have been bound by the unauthorized use of her name in violation of her injunction, and of which she never heard.

GEORGE, C. J., delivered the opinion of the court.

The bill of exceptions in this case was taken to the judgment of the Circuit Court overruling the motion of the plaintiffs in error for a new trial, and we are therefore not bound to reverse for an erroneous charge given to the jury, if we are satisfied that upon the evidence the verdict was right. We shall not therefore decide upon the correctness of the charge given for the defendant below, in which it is laid down that a married woman cannot be held as a member of a partnership unless it appear that she was an actual partner. If it be conceded that this instruction is wrong, and that a married woman holding herself out as a member of a firm would be estopped to deny that she was a partner, the evidence does not show that she ever held herself out as such, or knowingly permitted others to do so. Her name was printed on the letter-heads used by the firm as a partner, but it is shown that, as soon as she learned of this, she complained to her husband and the other member of the firm, and requested them to discontinue such use, and that they promised to do so. It is not shown that she afterwards knew that this promise was violated. We do not think she was compelled to do more than make this request, it not being shown that she had notice that it was not observed.

*Judgment affirmed.*

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BOARD OF SUPERVISORS OF MADISON COUNTY v. A. M.  
PAXTON.

1. CHANCERY PLEADING. *Answer. Negative pregnant. Exception.*

A denial of a charge in a bill based upon all the circumstances of time and place mentioned therein, although bad pleading, cannot be treated as an admission, but must be reached by exception to the answer.

2. **COUNTY RAILROAD BONDS. *Innocent purchaser. President of road.***  
The president of a railroad company is not an innocent purchaser of bonds issued in aid of the railroad by the board of supervisors of a county in violation of the Constitution and the statute which authorize their issuance only upon condition that two thirds of the legal voters of the county shall vote in favor thereof, if he receives them as bound to do under the charter, although he passes them to a creditor with notice, and takes them back as an individual purchaser.
8. **SAME. *Estoppel to deny validity. Receipt of stock. Paying interest.***  
The county is not estopped to maintain a bill to enjoin him from disposing of the bonds and cancel them, by the acts of the board of supervisors in assuming control of the railroad stock received therefor, and levying taxes and paying the interest on the bonds.

APPEAL from the Chancery Court of Warren County.

Hon. UPTON M. YOUNG, Chancellor.

*F. B. Pratt*, for the appellant.

1. Upon the face of the answer, the allegation of notice in the bill must be taken as confessed. *Mead v. Day*, 54 Miss. 58. There is no denial of the facts stated in the bill, which tend to show knowledge. All the attempted denials are general and evasive, are literal as laid in the bill, and are negatives pregnant. While in form they negative the statements of the bill, they imply an affirmation thereof. At most they are ambiguous in meaning, and that construction should be adopted which is most unfavorable to the pleader. *Stephens's* Pl. 379, 382. Upon the pleadings alone the appellant is entitled to a decree. No exception for insufficiency was necessary. Denials in the answer must be positive, direct and certain, and of the substance of the allegation; not literally as the charge is laid in the bill, and not by way of negative pregnant. *Story Eq. Pl. §§ 582, 584, 585.*

2. The appellee had the burden of proof to show that he had no knowledge of the facts which rendered the bonds void, and he has made no effort whatever to show want of notice. Illegality being admitted, it was incumbent on him to show that he did not receive the bonds under circumstances which create suspicion that he knew the facts which impair their validity. 1 *Dan. Neg. Inst. § 815*; 2 *Greenl. Evid. § 172*; *Hamilton v. Marks*, 63 Mo. 167. Fraud being established as to a negotiable instrument, the holder must exon-

erate himself from all participation in, or knowledge of, the fraud, or he can have no right in law or equity to recover. *Munroe v. Cooper*, 5 Pick. 412; *Vallett v. Parker*, 6 Wend. 615. In *Smith v. Sac County*, 11 Wall. 139 (a county bond case), it was held that the burden of proof is upon the holder of the bond when fraud or illegality is shown.

3. Under the circumstances of the case, notice is affirmatively shown. As president of the company it was his duty to investigate the facts connected with the bonds. If he did his duty, he knew the facts. *Cass County v. Green*, 66 Mo. 498, was a suit by the county against a banker who had purchased bonds of the county illegally issued, and circumstances much less strong than those in the case at bar, were held sufficient to charge him with notice of the irregularity. Whatever is sufficient to satisfy the jury that the purchaser acted in bad faith or was wilfully blind to the defect in the bonds, will warrant the inference that he had actual notice of the facts. *Wade on Notice*, § 88. In *Goodman v. Simonds*, 20 How. 343, 367, it is said that while the purchaser of negotiable paper is not bound to inquire, yet he must not wilfully shut his eyes to means of knowledge which he knows are at hand.

4. No authority supports the doctrine that the county is estopped to deny the validity of county bonds as against a purchaser with notice, except the case of *Shoemaker v. Goshen*, 14 Ohio St. 569, in which the court says, that knowledge on the part of the holder will not defeat the estoppel. But this was a mere dictum, as the question was not involved in the case. Upon this question, it will be noticed that the defendant purchased the bonds in controversy immediately after they were delivered to the railroad company, so that no interest had been paid upon these particular bonds. Again, it cannot be said that the defendant took the bonds in controversy upon the faith of the acts of the board of supervisors, for he shows by his answer that he took them in payment of advances made to the contractors, and further shows that the contractors were dependent upon the bonds for their pay. Hence, we may conclude that Paxton took the bonds from the contractors because he could get nothing else, and not because he relied upon the acts of the board of supervisors.

*Cowan & McCabe*, for the appellee.

1. The appellee had no notice, at the time he purchased the bonds in controversy, that they were not authorized by a vote of the electors of Madison County. The facts to be determined are, did he have actual knowledge of their illegality at the time he purchased them, or was he willfully blind to their illegality, and did he act in bad faith. *Swift v. Tyson*, Redf. & Big. Lead. Cas. on Bills of Exchange and Promissory Notes, 208; *Goodman v. Simonds*, Ib. 239. He acquired the bonds before their maturity. The presumption is that he became proprietor for value in the due course of business. The bonds are negotiable by delivery. Possession invests the holder before maturity *prima facie* with the immunities of a purchaser without notice. *Commissioners v. Bolles*, 94 U. S. 104; *Steines v. Franklin Co.*, 48 Mo. 167; *Flag v. Palmyra*, 38 Mo. 440; *Shoemaker v. Goshen*, 14 Ohio St. 569; *Atchison v. Butcher*, 3 Kansas, 104; *Commissioners v. Clark*, 94 U. S. 278; *Murray v. Lardner*, 2 Wall. 110; *Vicksburg v. Lombard*, 51 Miss. 111; *Cutler v. Board of Supervisors*, 56 Miss. 115. *Prima facie* the defendant's title is good, and in order to overcome this *prima facie* title, so as to let in defences between the original parties, the complainants must impeach his title. The *onus* is on the county of Madison, in this case, to adduce the facts to produce that result. There is nothing to show actual knowledge of the fact which it is claimed invalidates these bonds. There are some allegations in the bill, which show that the defendant was willfully blind, and that he acted in bad faith in the purchase. But these charges are specifically negatived in the answer, *ipsissimis verbis*, only using the negative form of expression. The denials of notice in the answer must be taken as evidence. *Brooks v. Gillis*, 12 S. & M. 538; *Miller v. Lamar*, 43 Miss. 383. When the answer is sworn to, and is responsive to the bill, it cannot be overturned, except by the testimony of two witnesses or one witness and corroborating circumstances. *Nichols v. Daniels*, Walker, 224; *Parkhurst v. McGraw*, 24 Miss. 184. The rule is applicable in this case for the reason that the bill is sworn to by an attorney not of his knowledge, but on information and belief. *Jacks v. Bridewell*, 51 Miss. 881. The positive statement of the

defendant, made under oath, that he did not know of the facts which invalidated the bonds in this case at the time he purchased them, and that he is a *bona fide* holder of the same for value, stands unassailed by any evidence. The board of supervisors, whose duty it was to decide the matter, decided that two-thirds of all the legal voters of the county had voted to authorize the issuance of the bonds. This was an official act, of which the defendant had knowledge at the time he purchased the bonds. The board levied a tax, and paid the interest. It was not his duty as president to look further than this. He was bound to presume that the board decided properly, and he swore that he did so presume, and acted upon their determination. He never heard of the defect in the bonds. Knowledge is not brought home to him. Even if he had been put on inquiry, he could have gone no further than the records of the board of supervisors. Apparently all was regular.

2. The county of Madison, by reason of the acts of its officials, is estopped now to set up the illegality of these bonds, or notice of the same, on the part of this defendant. The view which we take of this case renders it unnecessary for us to argue this proposition. We are entitled to an affirmance of the decree on the first branch which we have argued; we will be content therefore with one or two remarks, and the citation of a few authorities. The authorities all agree that a corporation, like an individual, may be estopped by the action of its officials, in certain cases. Some of the authorities put it on the ground that it is for the protection of innocent purchasers. We take the true rule to be that this protection is afforded to the innocent purchaser for the protection of commercial paper. Some of the authorities go so far as to say that purchasers may be protected whether they are innocent purchasers or not. *Rogers v. Burlington*, 8 Wall. 654; *Shoemaker v. Goshen*, 14 Ohio St. 569.

GEORGE, C. J., delivered the opinion of the court.

On July 21, 1870, the legislature incorporated the Canton and Vicksburg Railroad Company (Acts 1870, p. 205-214), and, in the charter, authority was given to the board of supervisors

of Madison County to subscribe for stock therein, and issue bonds to pay for the same. In pursuance of art. 12, § 14, of the Constitution, the charter required, as a condition precedent to the subscription for stock and making the bonds, that an election should be held, at which two-thirds of "all the legal voters" of the county should vote in favor thereof. In case of a favorable vote, the bonds were to be issued payable to the company or bearer, and by the eighth section of the charter, said bonds were required to be delivered "to the President or Secretary of said Company, for the use of said Company." Afterwards, the name of the company was changed to that of the Canton, Vicksburg and Yazoo City Railroad Company; and some amendments were made to the charter, immaterial to the question raised by the record; and on the thirtieth day of March, 1872, an election was held in Madison County, at which ten hundred and sixty-seven votes were cast for, and seventy-seven votes against, the subscription. The registered vote of the county being about three thousand eight hundred, the board adjudged that two-thirds of the legal votes were cast for the subscription, and thereupon made a subscription to the capital stock of the company of two hundred and fifty thousand dollars; bonds to that amount were also directed to be prepared and executed and placed in the hands of a trustee, to be kept by him and delivered to the company in instalments, when certain conditions relating to the progress of the work on the road were complied with by the company.

The appellee, Paxton, was president of the railroad company from its organization until after his purchase of the bonds in controversy in this suit. About September 11, 1878, an instalment of twenty-five thousand dollars of the bonds were called for by the company, and its vice-president and the contractors for building its road were in the town of Canton for the purpose of receiving them. A bill to enjoin the issue of said bonds, and the fiat of a judge granting the injunction had been prepared by a tax-payer of the county, and an injunction was about to be issued by the clerk of the Chancery Court. The injunction was predicated on the charge that two-thirds of the legal voters of Madison County had not voted for the subscription for stock or issue of the bonds. A compromise



was made between the vice-president and contractors on the one hand, and the complainant in the injunction bill on the other, whereby the bill was not filed, nor the injunction sued out, and the bonds were delivered to the vice-president by the trustee. Afterwards, on Jan. 31, and on Sept. 24, 1874, two other instalments of the bonds of twenty-five thousand dollars each were delivered to the company. These instalments were received by the appellee, Paxton, as president of the railroad company acting on its behalf. Of the last instalment, the three bonds in controversy in this suit were a part. Paxton paid these three bonds to a creditor of the company, and received them back in payment of a debt due by such creditor to him. The board of supervisors, for several years afterwards, paid the interest on the bonds so issued. On the third day of January, 1879, this bill was filed by the board of supervisors of Madison County against Paxton, charging the illegal issue of the bonds for the want of the two-thirds approving vote, and alleging his connection with the company as president, and charging him also with notice of that illegality; and especially with notice of the controversy initiated by the injunction suit, and its settlement before alluded to. The object of the bill is to enjoin Paxton from negotiating the bonds, and to have them delivered up and cancelled. Paxton denies the knowledge charged, but it is insisted that his denial is by way of negative pregnant, and that the allegation of the bill on that point should on that account be taken as admitted. We think the answer is liable to the objection, but we do not consider that it is such fault as entitles the complainant to take the allegation of the bill as admitted. It is a denial of the charge, as made in the bill, basing the denial upon all the circumstances of time and place mentioned in the bill, and therefore bad pleading. But we think that the complainant should have excepted, and required a further answer.

This brings us to the very important question, whether Paxton, being the president of the railroad company, and charged by the charter with the duty of receiving these bonds from the board of supervisors, and actually receiving them and passing them off to a creditor of the company, and then receiving them back, as an individual purchaser, stands in a better relation to

these bonds than the company which he represented; and whether he can deny the notice, which the law fixes on the company as payee in the bonds, and which it actually had in this case through its vice-president. It will be noticed that there is no attempt to shelter Paxton's purchase under the rights which the purchaser from the company may have had in case his purchase was *bona fide*. Paxton does not claim that this purchaser had no notice. His defence rests solely on the ground that he himself is a *bona fide* purchaser for value. The fact, therefore, that there was a sale by Paxton, as president of the company, to another, who in turn resold to Paxton as an individual, may be eliminated from the case, as it is not of the slightest value in determining the rights of the parties; and the case may be considered as if Paxton, as president of the company, and by its authority, had made the sale to himself on such terms as were satisfactory to the company. The power of the board of supervisors to issue these bonds was special and limited. It was no part of their ordinary jurisdiction. They were not the county of Madison, whose rights were to be affected by their action. They were not even the legal representatives of the county, except in so far as they pursued strictly the authority conferred on them by the charter of the railroad company, passed in pursuance of the Constitution. Whatever authority they had was given on a condition precedent, which must have been performed before the power vested. The performance of the condition precedent was not a mere form, but was of such substance as to have been prescribed by the Constitution itself. It was no less than the assent of two thirds of the legal voters, presumed to be tax-payers, on whom the burden of payment of the debt to be created must fall. All that the board did without this assent was mere usurpation, in violation of the Constitution of the State, and, therefore, was binding on no one. It is undeniable that whoever deals with a special agent, or an agent whose powers depend upon conditions, must inquire into the extent of the authority and see that the conditions exist on which the authority rests. Wharton on Agency, § 138. This is the rule when the agent is private, and it applies with especial

force to dealings with public agents, whose powers are defined in the Constitution and laws. Wharton on Agency, § 130. This duty to inquire into the authority of an agent is not measured by considerations solely relating to the validity of his contract as it may affect the interest of the person dealing with him. As thus circumscribed, it is predicable only of contracts in which the person dealing with the agent parts with something in the faith that the principal is responsible for it. In such a case, the failure to inquire into the agent's authority can affect no one but the party guilty of the neglect, and his inability to recover from the principal, though a proper penalty on him for his negligence, in no way wrongs the principal. But where, as in this case, something of value belonging to the principal is to be acquired by the transaction from the agent, which may be lost to the principal, or which may be perverted to the injury of the principal, the duty to inquire into the agent's authority, by the person dealing with him, is owed to the principal. Whoever thus acquires the principal's property wrongfully is bound to make restitution. And this duty to inquire into the agent's authority ought especially to be performed in a case like this, where negotiable paper of the principal is wrongfully issued by the agent, and it may by its wrongful subsequent transfer become binding on the principal.

The railroad company derived its being from a law enacted by a legislature which owed its existence to the Constitution. It had no other life than such as this legislature, acting under the Constitution, imparted to it. By the charter of the company and the Constitution of the State, the board of supervisors were prohibited from issuing the bonds, unless upon the assent, as a condition precedent, of two thirds of the legal voters. What the board of supervisors were thus prohibited from issuing the company was equally prohibited to receive. It was therefore the duty of the railroad company to see, before they received the bonds, that the assent was given. This is clear so far as the rights and duties of the company itself are concerned. But the company was an artificial being. It had no visible existence except through its officers and agents. It could do no act whatever without them. It had no mind to make inquiry or to receive notice, no judgment or will to ac-

cept or reject the bonds, and no hand to take them, except by means of its appropriate officers. If the duty to make the inquiry rested on the company, as we have shown that it did, it could only be performed by its officers or agents, and therefore the duty rested on them. And so resting on them, it must follow that, if its performance would result in actual notice, the officers on whom it rested must be charged with such actual notice. Mr. Paxton was the president of the company, and, as such, was specially authorized by the eighth section of its charter to receive these bonds. He was thus by law made the representative of the company as to its reception of them. He did in fact receive two thirds of all that were ever issued, including the bonds in controversy. He was therefore in legal effect, as to the reception of the bonds and all the duties connected therewith, the company itself. His mind and voice were the mind and voice of the company to make the inquiry as to the legality of the issue of the bonds, and his hand was the hand of the company to receive them. He was therefore under all the obligations that rested on the company to make inquiry as to the power of the board of supervisors to issue the bonds. It is certain from the facts shown in the record that if he had performed this duty he would have acquired, long prior to the issuance of the bonds now in controversy, actual notice of their invalidity. Even if he had not shut his eyes and closed his ears to what was going on around him, he must have acquired a knowledge of the fact that there was no assent of two thirds of the voters of Madison County to the issuance of the bonds. This fact was no secret. It was well known in Madison County, in which about one half the road of the company was located. The vice-president of the company, before any bonds were issued, had notice of the defect in the power of the board of supervisors to issue the bonds; the contractors, who were building the road, also had notice. The vote actually cast amounted to but a little more than one fourth of the legal voters of the county, a disparity readily perceived by any one even slightly acquainted with the current history and resources of the State. Nothing but the most inexcusable neglect and want of attention to his business prevented the president of the company

from actually knowing what seems to have been well known to every one interested in ascertaining the facts. Under these circumstances he cannot be allowed to aver ignorance of the invalidity of these bonds, which as president of the railroad company he illegally received from the board of supervisors, and then, in effect, bought individually from the company. It cannot be allowed that a man, who, as president of a corporation organized under the laws of this State, received bonds of a county issued in violation of the Constitution and the charter of the company, shall have a greater right to the bonds than the company he represented, based on an asserted ignorance of a fact, which as president of the company he was bound to know. That the bonds are illegal and invalid is admitted. They can have imparted to them no force, except in favor of a purchaser for value without notice. To allow Mr. Paxton this privilege would be to allow him to gain a right solely upon the ground of the non-performance of his duty to inquire into the powers of the board of supervisors, — a proposition for which there is no foundation in our jurisprudence.

There is nothing in the estoppel set up, as arising from the acts of the board of supervisors in assuming control of the stock, and levying taxes and paying the interest on the bonds. Whatever force these acts may have in favor of a *bona fide* purchaser of the bonds, it is certain that as to a party chargeable in law with notice of their invalidity, they can only be regarded as additional usurpations by the board of supervisors and additional wrongs to the tax-payers of the county. The fact that the appellee received interest to which he was not entitled rather raises an obligation on him to return it, than establishes a right to demand a further invasion of the rights of the tax-payers of the county.

*Decree reversed and decree here.*

## RAWLEY SIVLEY ET AL. v. CHARLES H. SUMMERS ET AL.

1. LIMITATIONS OF ACTION. *Estates of decedents. Four years' bar.*

A promissory note which matures after the maker's death is not within Code 1871, § 2155, which provides that no suit shall be brought against an executor or administrator, upon a cause of action against his testator or intestate, more than four years after his qualification.

2. SAME. *Four years' statute. Notice to creditors.*

The four years' limitation (Code 1871, § 2155), like the general Statute of Limitations, runs without regard to publication for creditors to probate their demands, which has no effect on any statute except that which requires claims to be registered within a prescribed time.

8. SAME. *Suits against executor. Nine months' suspension. War.*

Actions on notes maturing before the death of the maker whose executor qualified on Aug. 1, 1864, are barred by the four years' limitation on Aug. 12, 1872, notwithstanding the suspension of the statute until April 2, 1867, and the addition of nine months after the executor's appointment, during which he cannot be sued.

4. ESTATES OF DECEDENTS. *Insolvency. Decree. Estoppel. Parties.*

If a sale of land under insolvency proceedings is set aside at suit of the heirs who were not made parties thereto, and the purchaser seeks to be subrogated to the rights of the creditors whose claims were allowed and who received dividends, the heirs may show that such claims were barred before the inception of the proceedings.

5. SAME. *Original bill to impeach decree. Fraud. Infants.*

If innocent strangers' rights have not attached, a sale of the land to pay the debts of an insolvent estate may be set aside by the heirs, some of whom are minors, by original bill in the court which granted the decree, upon the ground that they were not legally served with process.

6. SAME. *Recitals in decree. Effect in proceedings direct and collateral.*

In such a case, recitals in the decree for sale as to service of process and proof of publication are only *prima facie* true, and do not cure the absence of a summons and the illegality of the citation, although in a collateral proceeding, as the record could not be contradicted, they would be conclusive. *Crawford v. Redus*, 54 Miss. 700, affirmed.

7. EXECUTOR. *Removal and resignation. Successor, when appointed.*

An administrator *de bonis non cum testamento annexo* can be appointed on the removal of an executor or his resignation, without notice to the legatees and without waiting for the final settlement, which terminates liability on the executor's bond. Code 1871, § 1122.

57	712
78	465
57	712
86	627
57	712
95	847
95	849
95	850
95	851

8. **BILL TO VACATE SALE.** *Restoration of status quo. Purchaser.*

The sole creditor of an insolvent estate, who has purchased land by collusion with the administrator, and paid for it with his claim, if the sale is cancelled at suit of the heir, should be restored to his status as a creditor.

9. **SAME.** *Improvements and rents. Good faith. Trustee.*

Improvements which the administrator and his confederate, who hold under the fraudulent sale, have put on the land should not be allowed them, but they should not be charged increased rent caused by the improvements. *Tatum v. McLellan*, 58 Miss. 352, cited.

10. **SAME.** *Taxes. Lien. Assessment. Land listed to dead person.*

They should be allowed for taxes assessed upon the land, which was listed in the name of a dead person who had owned a life-estate therein, if they alone paid them; *aliter*, if the heir paid the same taxes.

11. **SAME.** *Assessment roll. Approval.*

The result is not altered by the fact that the assessment of taxes was irregular, because the assessment roll of land was not approved by the board of supervisors in session at the county town.

**APPEAL** from the Chancery Court of Hinds County.

Hon. E. G. PEYTON, Chancellor.

On March 2, 1864, G. W. Summers died in Hinds County, Mississippi, the owner of an estate real and personal, including the land in controversy. He devised his property to his heirs and his widow, Maria J. Summers, the realty to be divided among them according to the statute, and appointed his son, Charles H. Summers, and one Charles Hill, his executors. The will was registered in the Probate Court of Hinds County, where the land lies, and on Aug. 1, 1864, the executors qualified. Charles H. Summers resigned April 8, 1868, with the consent of Hill, but without notice to the legatees, and his resignation was accepted by the court. On March 12, 1872, Rawley Sivley and R. S. Drone, two creditors of G. W. Summers, by promissory notes, due respectively Feb. 21, 1861, and Jan. 1, 1865, which had been registered as claims against the estate, petitioned the Chancery Court, which had succeeded to the Probate Court, to require Hill to give bond, and upon his failing to respond to a summons, the order was made. Hill disobeyed the order, and on May 25, 1872, was removed, and ordered to make his final settlement; which neither he nor Charles H. Summers

ever did. Rawley Sivley, who on Aug. 12, 1872, upon his own petition, was appointed administrator *de bonis non cum testamento annexo*, two days afterwards filed a petition and exhibit of insolvency of the estate in the statutory form, showing nineteen debts, consisting of accounts and notes duly probated, but all due between the years 1860 and 1863, except the note for two thousand five hundred dollars, payable to Drone, and described eighteen hundred acres of land as the only remaining property liable to sale, subject to the widow's dower, as the means of partially paying the debts.

The court thereupon ordered notice to the heirs as follows: That summons issue to Hinds County for Charles H. Summers and Louisa C. Summers, adults, and Samuel W. Summers, Bettie B. Summers, and Sallie C. Summers, minors, and to Copiah County for Robert D. Osburn and Lennie L. Osburn, his wife, and that publication be made according to law for Beckwith Bealmaer and Laura B. Bealmaer, his wife, residing at Brook's Station, Bullitt County, Kentucky, to appear at the next November term of court, and show cause why the estate should not be declared insolvent, and the land described be sold. No summons for Mr. and Mrs. Osburn appears in the record. The return of service on the minors was of the ordinary personal service by copy, without reference to their parents or guardian; but the clerk of the court was appointed guardian *ad litem* for them, and filed the formal answer. The order for publication was not published, but a citation was inserted in a newspaper published in the county more than twenty days after the order was made, for four consecutive weeks, as shown by proof of publication and copies mailed, properly directed to Mr. and Mrs. Bealmaer, as shown by the clerk's certificate. At the November term the court ordered that the proof of publication, and of mailing notice, be received and filed, reciting due proof of publication and of sending copies to the non-residents and that process was duly served on all the other parties.

The decree which declared the estate insolvent was made Nov. 18, 1872. Reciting that due proof of publication and of sending copies to the non-residents was made, and that process was duly served upon all the other parties, the decree ordered



the sale of the land, and directed the administrator to give three months' notice to the creditors to prove their demands, and to administer the estate according to the usual insolvency proceedings. The administrator reported that the sale of the land was regularly made on Dec. 21, 1872, in proper parcels, all of which were purchased by R. S. Drone, for the aggregate sum of four thousand eight hundred dollars, one-third, or six hundred acres, which is the part in controversy in this suit, being only a remainder after the widow's dower. The report was confirmed, and the administrator conveyed to Drone. On Feb. 21, 1873, on proof of publication of the three months' notice, and the clerk's report of claims registered, the court ordered them to be taken up on May 19, 1873, for examination and allowance, when the creditors should attend. R. S. Drone, Rawley Sivley, and others excepted to all the other claims. Their exceptions were sustained, and the proceeds of the land sale were ordered to be distributed among them, the debts to Drone and Sivley amounting to about fifteen thousand dollars, and the others allowed to about three hundred dollars. Thereupon the administrator filed his final settlement, showing that he had four thousand four hundred dollars to be paid *pro rata* on the debts established and on May 19, 1873, he was finally discharged. The dividend report was filed by the clerk, showing the *pro rata* of Drone to be fourteen hundred and thirty-four dollars, and that of Sivley twenty-six hundred and ninety-seven dollars. This report was confirmed on May 27, 1873, and the administrator ordered to stand acquitted upon paying these sums.

The widow died in July, 1876; and Rawley Sivley and R. S. Drone then demanding possession, and putting tenants on the place, on June 26, 1877, Charles H. Summers and the other heirs and devisees who continued to hold after the widow's death, filed an original bill in the Chancery Court of Hinds County against them to vacate the decree and sale and the administrator's deed to Drone, and the deed from him to Sivley, upon the following grounds:—(1) that Charles H. Summers was the executor undischarged at the time Rawley Sivley was appointed administrator, *de bonis non*

*cum testamento annexo*, and therefore Sivley's appointment was void. (2) There was no service of process on R. D. Osburn and his wife. (3) There was no valid service of process on the minor heirs. (4) There was no valid constructive service on Beckwith Bealmaer, and Laura B., his wife. (5) The lands were purchased at the sale by the pretended administrator and Drone jointly. (6) The petition for sale does not show that there were any valid demands against the estate at the time it was filed. The answer controverted these several propositions, and relied also on the Statute of Limitations of Code 1871, § 2173. From an adverse decree on final hearing, the defendants appealed to the Supreme Court, which held the administrator's sale void upon the single ground that Drone and he confederated to purchase the land jointly, and remanded the case to give the defendants an opportunity to propound their claim to fasten upon the land a charge for one-third of the amount paid by them in the purchase, and to afford the means of determining for what amount, under the facts of this case, the lien should be established, and whether the allowance of the claims in the proceeding of insolvency should be accepted as conclusive, or the heirs could, in resisting the establishment of the charge, show that the debts were barred.

On the return of the case to the Chancery Court the defendants filed an amended answer and cross-bill under oath, in which they asserted their right to fasten a charge upon the land; asked as an offset against rents sums paid by them as taxes and for valuable improvements; denied that their claims against the estate were barred by the Statute of Limitations, and alleging that their joint demands, or Drone's alone, exceeded the proceeds of the land, pleaded that if the other claims were barred the heirs were not prejudiced by the *pro rata* payment, and insisted that if the decree should be annulled the entire proceeds of the sale should be decreed to them, rather than to the heirs. After further alleging that the purchase-price was paid in good faith by the surrender of their notes, they prayed that, if the sale should be vacated, the heirs be compelled to refund the amount thereof, or

that they be restored to their condition as creditors. The evidence showed that during the years 1877, 1878, and 1879, the land was listed in the name of the deceased widow, that the taxes for 1877 were paid both by the complainants and the respondents, and that the latter paid the taxes for 1878 and 1879. The only order of approval of the assessment roll of lands in Hinds County in 1875, which the record disclosed, was made by the supervisors assembled at Jackson. It was further proved that the defendants had collected rents and made improvements in 1877, but that during the two following years a receiver had been in possession. On the final hearing it was decreed that the cross-bill be dismissed, and the relief prayed for in the original bill granted. From that decree the defendants appealed.

*W. P. Harris*, for the appellants, argued the case orally and filed a brief.

1. The objection to the appointment of Sivley as administrator is not well taken. Summers's resignation did not discharge him from accountability, nor did the removal of Hill have that effect as to him. The object of citing the heirs is that they may contest the account; and both remained liable to account. Code, §§ 1120-1122. The appointment of Sivley was valid. The sale of the land in the insolvency proceeding has been set aside on grounds independent of the character of that proceeding. Sivley, the administrator, being a partner of Drone in the purchase at his own sale, the heirs elected to set aside the sale for that cause amongst others; and this court held that cause to be sufficient, without noticing the others. The question now presented is, What are the rights of these purchasers? They were creditors, or claimed to be such, as well as purchasers, their debts having been used in the purchase. These rights are to be considered with reference to two aspects of the case. First, how do they stand under a valid decree of sale? Second, how under an invalid decree, that is, a void decree?

2. If the decree was valid, and merely erroneous, the consequence would be that the action of the court, in passing the claims of creditors, must stand. The jurisdiction of the court in such a proceeding is complete over the question of debt or

no debt. The statute withdraws the subject from all other courts, and vests in the Chancery Court the decision of all questions concerning the claims presented, as fully as the jurisdiction to distribute an estate. Its decree is final and conclusive until reversed. It matters not what the objection to the claim may be, — payment, lapse of time, or want of validity on any ground, — they are all presumed to be judicially determined. The court is required to examine each claim, before allowing it, and its allowance has all the force of a judgment establishing the claim in any other court. Code 1871, § 1161; *Winn v. Barnett*, 31 Miss. 653. The result must be, therefore, if the decree of insolvency was valid, that the whole amount of the purchase-money must be refunded to the purchasers, for it is shown that there was a substantial application of it to debts established, and therefore binding on the property. Courts of equity have uniformly allowed this, where the sale has been set aside at the election of the heirs. They have allowed not only the purchase-money, but taxes paid, and improvements which have added value to the estate. 1 Perry on Trusts, § 197, 205; *Michoud v. Girod*, 4 How. 503; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Charles v. Dubose*, 29 Ala. 367; *Andrews v. Hobson*, 23 Ala. 219. These are cases of purchases by executors or administrators of the property of the estate. The sales are avoided on grounds of public policy only. In this State the principle has been applied to a case of actual fraud in the purchaser, as where there was a combination to prevent bidding. *Grant v. Loyd*, 12 S. & M. 191. The cases of *Short v. Porter*, 44 Miss. 533, and *Gaines v. Kennedy*, 53 Miss. 103, show a full recognition of the doctrine. The act of 1873 (Acts 1873, p. 41) was not intended to restrict the right of the purchaser, but to extend it and give it wider operation. The actual payment and application of the money is the only test under the act. If for any cause the sale is void, the purchase-money actually paid, and applied to extinguish valid debts, must be refunded. The act recognizing this right as a substantive right has not confined it to the cases in which the heir seeks to recover the land of the purchaser, but extends it to his vendee, and gives the right to set off the purchase-money in the action of eject-

ment. The result is plainly marked out, if the decree of insolvency was valid.

3. It is insisted, however, that it was void ; and that the subsequent action of the court on the claims was void also as a consequence. The ground of invalidity is the alleged want of jurisdiction of the parties ; and to give force to it, it is urged that the jurisdiction to sell lands to pay the debts of a decedent is special and limited. The court had jurisdiction of the subject-matter, and where that is conceded, the matter of acquiring jurisdiction over the parties is the same in all courts. The difference between the jurisdiction conferred over the subject by the Constitution or by statute, and that which the court acquires through its own process and orders, is obvious. As to the subject-matter, the court cannot conclusively determine its jurisdiction. Its decision that it has jurisdiction gives no force or validity to the claim. A higher law governs that. The court may, however, conclusively decide whether it has acquired jurisdiction of a party. The power to acquire jurisdiction of the parties interested in a subject-matter is incident to judicial power, wherever lodged. If a statute should omit to prescribe a process, the court, being charged to decide, would have the inherent power to issue a summons. A court having the power to acquire jurisdiction by its process and orders is necessarily vested with the power to decide whether it has acquired the jurisdiction of the person. Its decision may be erroneous, but it is not void for error in this respect. In the matter of acquiring jurisdiction of non-resident parties, the means are the same in all our courts. The fact of publication according to law is, by the very terms of the statute, proved by deposition. Recitals that parties have been served with process, and that publication has been made, mean the same thing in all courts. They mean, first of all, that the court has considered and decided the point, and then they import truth. Judgments, therefore, of courts of any grade having jurisdiction of the subject, in which it appears that they decided that process had been served or publication made, are conclusive in any collateral proceeding. They are bound to decide the very matter ; and a decision of it, if wrong, is only erroneous. *Cason v. Cason*, 81 Miss. 578 ; *Field v.*

*Goldsby*, 28 Ala. 218; *Hendrick v. Whittemore*, 105 Mass. 23; *Kipp v. Fullerton*, 4 Minn. 473; *Richards v. Skiff*, 37 Cal. 465; *Quivey v. Baker*, 8 Ohio St. 586; *Callen v. Ellison*, 13 Ohio St. 446; *Cocks v. Simmons*, *ante*, 188. The recital in the decree is full, that all parties had been duly served with process, and that proof of publication against the non-resident parties had been made. It is urged that the minors were not served in the manner required by the statute. It will be observed that the provisions of the Code of 1871, respecting sales of the lands of decedents for the payment of debts, are the same as those of the Code of 1857. The general provision — that process shall be served on the infant defendants and on their guardian — relates to cases where process is required to be served on the infant. In the proceeding in question here, the statute does not require service on the infant. *Burrus v. Burrus*, 56 Miss. 92; *Johnson v. Cooper*, 56 Miss. 608. There does not appear in the record any summons returned against Osburn and wife. The recital of service is conclusive as to this fact. The mere absence of the process from the record does not contradict the recital. *Cocks v. Simmons*, *ante*, 188. The administration of estates and jurisdiction in equity are confided to the same court. The means of obtaining jurisdiction of the person is the same in both cases. The process is served, where it is required to be served, in the same way, by the same officer, and the evidence of such service is precisely the same in all the proceedings of that court; and it appears unreasonable to distinguish between recitals in the one case and those in the other.

4. Assuming the decree to be valid, and the sale voidable only at the election of the heirs, then the purchase-money must be refunded to the purchaser, who, in the class of cases to which this belongs, will either recover his money or hold the land; and this principle is to be carried out, so far as it is practicable. Where the purchase-money has not been paid, or is still within the power of the court, the rule is to order a re-sale, in which the property is offered at the price bid by the purchaser, and if no one bids more, the first sale is permitted to stand; but where the purchase-money has passed beyond the control of the court, and has been applied to legitimate

charges on the estate, then the amount, with interest, must be refunded. If, on the other hand, the court, on the grounds alleged against the validity of the proceedings, should hold them void, then we contend that the creditors, whose claims were valid at the date of the decree, are remitted to their original relations to the estate. If it appears that a creditor was a purchaser for his debt, he must be treated now as a purchaser or as a creditor. The court proposes to make full restitution to the heirs of their inheritance, but will not confiscate to their use valid debts. If the insolvency proceeding was void and altogether ineffectual to subject the property to the satisfaction of the debts, they are not for that reason extinguished. The purchasing creditors here were so placed that they must await the action of those who alone had the right to question the proceedings. So long as the heirs forbore to complain, the purchasers must act on the supposition of a legal disposition of the whole subject. Their claim to be paid their debts by a re-sale or otherwise, or for reimbursement of purchase-money, springs from the assertion by the heirs of title to the property; and it cannot be said that the Statute of Limitations can be applied to their debts. Their hands, at least, were tied by the decree of insolvency. In one character or the other, therefore, the appellants must, on settled principles, be allowed to charge the lands as purchasers or as creditors.

*T. J. & F. A. R. Wharton*, on the same side.

1. The recitals in the decree as to publication of notice for, and service of process on, the heirs and devisees of G. W. Summers, are conclusive of such facts, unless they are contradicted or disproved by other portions of the same record, and cannot be invalidated in any collateral suit, nor can they be disproved by parol evidence. *Byrd v. State*, 1 How. 163; *Smith v. Denson*, 2 S. M. 326; *Hardy v. Gholson*, 26 Miss. 70; *Cason v. Cason*, 31 Miss. 578; *Cannon v. Cooper*, 39 Miss. 784; *Pollock v. Buie*, 43 Miss. 140; *Lambeth v. Elder*, 44 Miss. 80; *Wells v. Smith*, 44 Miss. 296; *Cole v. Johnson*, 53 Miss. 94; *Dogan v. Brown*, 44 Miss. 235; *Voorhees v. Bank of United States*, 10 Peters, 449; *Yerger v. Fergusson*, 55 Miss. 194; *Cocks v. Simmons*, ante, 188. The decision in

*Crawford v. Redus*, 54 Miss. 700, so far as it holds that such recitals are *prima facie* evidence only, is in conflict with the decisions in all the foregoing cases; and it was not decided in that case that they could be disproved by parol evidence. Under the decision in *Cocks v. Simmons*, ante, 183, the mere absence from the files of the cause of a summons for Osburn and wife cannot operate to disprove the recitals in such decree. Counsel for the appellees rely upon Cooley Const. Lim. 405, 406, to show that the records of courts of special jurisdiction must show all necessary jurisdictional facts, and that such recitals may be contradicted by parol evidence. Yet the same author says, at p. 407: "This we conceive to be the general rule, though there are apparent exceptions as to those cases where the jurisdiction may be said to depend upon the existence of a certain state of facts, which must be passed upon by the courts themselves, and in respect to which the decision of the court once rendered, if there was any evidence whatever on which to base it, must be held final and conclusive in all collateral inquiries, notwithstanding it may have erred in its conclusions." If the decree was erroneous only, it could not be reversed or vacated except under a writ of error or an appeal, and, until so vacated, no relief could be granted to the appellees either by the Chancery Court or by this court.

2. Although the publication of the notice to Bealmaer and wife was not commenced within twenty days from the date of the decree therefor, as provided in Code 1871, § 1013, yet, as copies of such decree were mailed to them in time, this should be regarded as a sufficient compliance with the manifest intention of the legislature disclosed in this section, and such construction must be given to it, even though it may not strictly consist with its language. *Ingraham v. Speed*, 30 Miss. 410; *Cason v. Cason*, 31 Miss. 578; *Olive v. Walton*, 33 Miss. 108; *McIntyre v. Ingraham*, 35 Miss. 25; *New Orleans Railroad Co. v. Hemphill*, 35 Miss. 17; *Koch v. Bridges*, 45 Miss. 247; *Virden v. Bowers*, 55 Miss. 1; *Knowles v. Summey*, 52 Miss. 377. Again, such publication and mailing of notice are entitled to the same force and effect as a defective service of process personally, which would only render such decree



for sale erroneous, and not void, until reversed on appeal or writ of error. *Smith v. Bradley*, 6 S. & M. 485; *Campbell v. Hays*, 41 Miss. 561; *Hanks v. Neal*, 44 Miss. 212; *Harrington v. Wofford*, 46 Miss. 31; *Hendricks v. Pugh*, ante, 157. It was not necessary, under Code 1871, § 1158, that the summons for the minor heirs of G. W. Summers should have been also served on their mother. The record shows that neither of them had a legal guardian of their person and estate. That section is a copy of Code 1857, p. 448, art. 98. *Winston v. McLendon*, 43 Miss. 254; *Wells v. Smith*, 44 Miss. 296; *Johnson v. Cooper*, 56 Miss. 608; *Burrus v. Burrus*, 56 Miss. 92; *Bailey v. FitzGerald*, 56 Miss. 578. Previous to the Act of April 15, 1876 (Acts of 1876, p. 188, § 32), the only statutes which required that process for a minor should also be served on his father, mother or guardian, if he had any in this State, were Code 1871, §§ 704, 1006, the former of which applied only to process from a Circuit Court, and the latter only to courts of chancery in the exercise of their general equity jurisdiction. The fact that Charles H. Summers was allowed to resign as one of the executors of G. W. Summers, without notice to the heirs and devisees, could not invalidate the appointment of Rawley Sivley as administrator *de bonis non cum testamento annexo*, although the final account then rendered by him would be void for want of such notice. Code 1857, p. 439, arts. 64-67; *Dowd v. Morgan*, 23 Miss. 587.

8. The decree for sale of the lands was not void if any one of the debts probated and registered against the estate of G. W. Summers was then unpaid, and not barred by any Statute of Limitations, as in such case it would have been erroneous only, to the extent of such claims as were then barred by the Statute of Limitations. *Ferguson v. Scott*, 49 Miss. 500; *Yandell v. Pugh*, 53 Miss. 295; *Yerger v. Ferguson*, 55 Miss. 190. The legal representatives, heirs and devisees of G. W. Summers are estopped from pleading the Statute of Limitations against any of the debts which were probated and registered against his estate, and which were not barred by the Statute of Limitations at the time of his death, because no notice of the grant of letters testamentary, or of administration, was published as provided for in the Codes of 1857, p. 443, art.

81, or in the Code of 1871, § 1135; and because this art. 81 of the Code of 1857 was suspended, previous to the death of said Summers, until twelve months after the then war, by the following statutes: Act of Aug. 5, 1861 (Acts 1861, called session, p. 74); Jan. 29, 1861 (Acts 1861-2, p. 235); and Dec. 31, 1862 (Acts 1862, p. 78). *Helm v. Smith*, 2 S. & M. 403; *Dowell v. Webber*, 2 S. & M. 452; *Pearl v. Conley*, 7 S. & M. 356; *Branch Bank v. Windham*, 31 Miss. 317. As this court has frequently decided that the Statute of Limitations was suspended until the second day of April, 1867, and that suits cannot be brought against an executor or administrator until after nine months from his appointment, the claims of Rawley Sivley, R. S. Drone, and others, were not barred by the six years' Statute of Limitations on Aug. 14, 1872, when the petition for the sale of the lands was filed in the Chancery Court. But if all these claims were barred by the four years' Statute of Limitations (Code 1857, art. 11, p. 400, which is the same as Code 1871, § 2155), except the one in favor of R. S. Drone, which did not become due until after the death of G. W. Summers, and which became due on Jan. 1, 1865, this was not barred by the four years' Statute of Limitations. This made Drone a valid creditor at the time the estate of G. W. Summers was declared insolvent, and the decree for the sale of his lands was made. *Bingaman v. Robertson*, 25 Miss. 501; *Pope v. Bowman*, 27 Miss. 194; *McLean v. Ragsdale*, 31 Miss. 701; *French v. Davis*, 38 Miss. 218; *Buckingham v. Walker*, 48 Miss. 609.

4. The purchase price for the lands was paid in good faith, and was applied in good faith to the payment of the debts due by G. W. Summers. But it is immaterial whether the purchase-money was so paid or applied, as in any case, even if the sale of the lands was void because of the alleged fraud, Drone and Sivley, or Drone, if his claim against G. W. Summers's estate was the only valid one, would be entitled to a lien on the lands sold to the extent that such purchase-money discharged debts then valid against such estate. Acts 1873, p. 41; *Grant v. Lloyd*, 12 S. & M. 191; *Short v. Porter*, 44 Miss. 533; *Gaines v. Kennedy*, 53 Miss. 103; *Hill v. Billingsly*, 53 Miss. 111; *Cole v. Johnson*, 53 Miss. 94.

The words "in good faith," used in the Act of Feb. 11, 1873 (Acts 1873, p. 41), with reference to the application of money arising from the sale of real estate, should not be construed in any technical sense, but only as intended to show that it should be applied without knowledge of any fraud by the administrator or purchaser. *Cole v. Johnson*, 53 Miss. 94; *Morgan v. Hazlehurst Lodge*, 53 Miss. 665. The appellants should also be allowed credits for taxes and the value of the improvements made on the lands as against charges for the rent thereof. *Cole v. Johnson*, *ubi supra*.

*F. A. R. Wharton*, on the same side, made an oral argument.

*W. Calvin Wells*, for the appellees, argued orally and filed a brief.

1. Drone and Sivley should not be paid, by virtue of the Statute of Feb. 11, 1873 (Acts 1873, p. 41), any portion of the amount bid by them. (1.) Because the purchase-money arising from such sale was not paid in good faith by the purchaser. Code 1871, § 2173, simply requires that the money shall be "paid," while Acts 1873, p. 41, requires that it shall be paid in "good faith." It has been decided by this court that the element of "good faith" referred to in § 2173, Code 1871, does not exist in this sale. *Summers v. Brady*, 56 Miss. 10. (2.) The statute requires the money to be paid to the administrator, which Rawley Sivley was not, because he was appointed while Charles H. Summers was undischarged as executor. By the common law an executor or administrator could not resign his trust. He must hold it until the estate is finally administered. Under Hutch. Code, p. 674, he could resign by giving sixty days' notice, by posting notices at the court-house door, and by publishing such notice in a newspaper for such length of time as the court might deem necessary. And Code 1857, p. 489, art. 67, provides that he may surrender his trust on "giving the proper notice to the distributees." The resignation could not be accepted without notice to the heirs, and it is absolutely void. *Winborn v. King*, 85 Miss. 157; *Treadwell v. Hern-don*, 41 Miss. 38; *Neal v. Wellon*, 12 S. & M. 649; *Neylans v. Burge*, 14 S. & M. 201; *Fort v. Battle*, 13 S. & M. 133; *Steen v. Steen*, 25 Miss. 513; *Henderson v. Winchester*, 31

Miss. 290; *Rives v. Patty*, 43 Miss. 338. The statute allowing administrators to surrender their letters, being in derogation of the common law, should be strictly construed. If Charles H. Summers was executor at the time Rawley Sivley was appointed administrator, the appointment is void. Code 1871, §§ 1120, 1121; *Vick v. Mayor of Vicksburg*, 1 How. 349; *Boyd v. Swing*, 38 Miss. 182; *Lewis v. Brooks*, 6 Yerger, 167; *Griffith v. Frasier*, 8 Cranch, 9; *Flinn v. Chase*, 4 Denio, 90; *Pryor v. Downey*, 50 Cal. 389; *Long v. Burnett*, 13 Iowa, 28; *Frederick v. Pacquette*, 19 Wis. 541; *Sitzman v. Pacquette*, 13 Wis. 291; *Haynes v. Meeks*, 20 Cal. 228. If Sivley's appointment is void, then all his acts, as administrator, are void. *Sitzman v. Pacquette*, 13 Wis. 291; *Chase v. Ross*, 36 Wis. 267; *Sumner v. Parker*, 7 Mass. 79; *Withers v. Patterson*, 27 Texas, 449; *Ex parte Barker*, 2 Leigh, 719; *Miller v. Jones*, 26 Ala. 247; *Unknown Heirs v. Baker*, 23 Ill. 484; *Enicks v. Powell*, 2 Strob. Eq. 196; *Matthews v. Douthitt*, 27 Ala. 273. (3.) The purchase-money was not applied in good faith to the payment of debts of the decedent. The claims were all barred. Code 1871, § 2155. There can be no controversy as to any claim but Drone's; but that was also barred. The object of the statute was to fix the limit of four years during which an administrator could be sued. If the claim accrued prior to the death of the decedent, then the four years would begin from the grant of letters of administration. But if it should accrue at a subsequent time, then the statute begins to run when it falls due. This view of the statute is not in conflict with the various decisions of our Supreme Court thereon. Failure to give notice has no bearing on the Statute of Limitations, but refers exclusively to the probate of claims.

2. The decree of insolvency and allowance of the claims is void. No process is in the papers in the cause for Osburn and wife. They were not summoned to contest. It is not enough for a decree to recite that the defendants have been served with process, but the summons should appear. *Stampley v. King*, 51 Miss. 728; *Dogan v. Brown*, 44 Miss. 235; *Hanks v. Neal*, 44 Miss. 212; 2 Dan. Ch. Prac. 1002, n. 4; *Randall v. Songer*, 16 Ill. 27; *Hanson v. Patterson*, 17 Ala. 738; *Green*

v. *Breckenridge*, 4 Monroe, 541; *Peers v. Carter*, 4 Litt. 269; *Pouns v. Gartman*, 29 Miss. 183; *Schirling v. Scites*, 41 Miss. 644; *Edwards v. Toomer*, 14 S. & M. 75; *Dean v. McKinstry*, 2 S. & M. 218; *Pittman v. Planters' Bank*, 1 How. 527. The jurisdiction is special and limited, and the recitals may be shown to be false. *Cooley Const. Lim.* 405, 406. Osburn and wife, not having notice of the petition, as the law directs, the whole proceeding is void, and being void as to them, is void as to all. *Root v. McFerrin*, 37 Miss. 17; *Hamilton v. Lockhart*, 41 Miss. 460; *Martin v. Williams*, 42 Miss. 210; *Stampley v. King*, 51 Miss. 728; *Mundy v. Calvert*, 40 Miss. 181; *Ware v. Houghton*, 41 Miss. 370; *Dogan v. Brown*, 44 Miss. 235; *Winston v. McLendon*, 43 Miss. 254; *Laughman v. Thompson*, 6 S. & M. 259; *McLaurin v. Parker*, 24 Miss. 509; *Kempe v. Pintard*, 32 Miss. 324; *Shipp v. Wheelless*, 33 Miss. 646. And again there was no valid constructive service of process on Mrs. Bealmaer and her husband. Code 1871, § 1013, directs how the notice shall be given to non-residents. The defects in this order of the court for publication are fatal. Again, the said probate proceeding is void for the want of proper service of process on the minors. No copy was served on the mother. Code 1871, §§ 704, 1006, 1158. The process should be served on the infant personally, and upon his father, or mother, or guardian, if he have any in this State. *Mullins v. Sparks*, 43 Miss. 129; *Winston v. McLendon*, 43 Miss. 254. The court did not acquire jurisdiction over the infant heirs. *Price v. Crone*, 44 Miss. 571; *Ingersoll v. Ingersoll*, 42 Miss. 155. For the foregoing reasons, and also because, Sivley not being administrator, his petition was a nullity, the decree of the Chancery Court allowing the claims is not binding on the heirs.

3. All the reasons assigned why Sivley and Drone are not entitled to the relief asked under the statute, apply with equal force to the equitable doctrine of subrogation. The administrator can stand in no better attitude than the creditors whose claims he has paid. *Wallace's Appeal*, 5 Penn. St. 103; *Bright v. Boyd*, 1 Story, 478; *Valle v. Fleming*, 29 Mo. 153. Sivley was not the administrator of the estate, nor was Drone. He therefore had no interest in discharging these pretended debts, and cannot be subrogated to the rights of

the pretended creditors. *Lafon v. White*, 3 La. Ann. 497. The legal subrogation extends only to cases when a person pays a debt which he has an interest in discharging. *Pecquet v. Pecquet*, 17 La. Ann. 204. A mere volunteer cannot be subrogated. *Sherin v. Budd*, McCarter (N. J.), Ch. 235. An administrator is under no personal obligation to pay a judgment against his intestate with his own funds, and if he does, he will not be substituted to the rights of the judgment creditor. The doctrine of subrogation only applies when the party advancing the money stands in the relation of surety, or is compelled to pay to protect his own rights. Subrogation cannot take place by effect of law beyond the amount actually disbursed. *Shropshire v. Creditors*, 15 La. Ann. 705; *Roman v. Forstall*, 11 La. Ann. 717; *Fuselier v. Babineau*, 14 La. Ann. 764.

4. As to the taxes and improvements; (1.) To claim pay for improvements, the statute (Code 1871, § 1557) requires that the improvements should have been made before the defendant had notice of the intention of the plaintiff to bring suit, which is not shown to have been the case here. Again, the statute requires that the party making the improvements should be in possession under some instrument of writing acquired in "good faith." This court has already decided that the title of Sivley and Drone was not acquired in good faith. The executor, who is a trustee, cannot, after fraudulently procuring title to the trust estate, claim for himself and his confederate the expenditures which they have made thereon. *Tatum v. McLellan*, 56 Miss. 352. (2.) The chancellor properly refused to allow anything for the taxes. The record shows that the heirs of G. W. Summers, deceased, paid the taxes themselves for the year 1877. The lands were assessed to Mrs. Summers, and the payment by Sivley and Drone of the taxes was voluntary and unauthorized. Payment of taxes under these circumstances created neither a lien on the land nor an enforceable demand against the owner. *Ingersoll v. Jeffords*, 55 Miss. 37. Again the assessment roll of land, which was improperly approved in 1875, rendered the taxes void for the succeeding four years. Code 1871, §§ 1675, 1685. There was no legal demand against the land for taxes, and the payment by Sivley and Drone created no demand against its owners.

CAMPBELL, J., delivered the opinion of the court.

At the time of the appointment of Rawley Sivley, administrator *de bonis non cum testamento annexo* of G. W. Summers, deceased, all the claims against said decedent were barred by Code 1871 § 2155 continued in force from the Code of 1857, except the claim of R. S. Drone, evidenced by the promissory note of the testator, due and payable Jan. 1, 1865. It was not barred, because it matured after the death of the testator and maker, and, therefore, was not a cause of action against him, and, according to repeated decisions, is not affected by the statute cited. *Bingaman v. Robertson*, 25 Miss. 501; *Pope v. Bowman*, 27 Miss. 194; *French v. Davis*, 38 Miss. 218; *Buckingham v. Walker*, 48 Miss. 609.

The other claims against the testator matured in his lifetime, and were subject to the operation of the section of the Code cited. We begin the computation of time on April 2, 1867, and add nine months, during which a suit could not be brought against the executors, and the result is as stated. The four years' bar was independent of publication by the executors of notice to creditors to present their claims. That publication is important only with reference to the requirement to present and register claims against the decedent. The four years' statute cited, and the general Statute of Limitations, run without regard to publication by the executor or administrator of notice to creditors. Whether that publication is made or not has no effect on any statute, except that which requires claims to be presented and registered within a prescribed time.

The decree for the sale of the land of G. W. Summers, which this bill seeks to vacate, was made on the application of Rawley Sivley, as administrator *de bonis non cum testamento annexo* to pay debts of the decedent, all of which, except one, were barred by the Statute of Limitations. We have heretofore held that the sale of the land, and the purchase by Drone, were voidable, and we remanded the case for Sivley and Drone to propound their claim to be substituted to the rights of creditors as to the land. We left it an open question, whether it could be shown that the claims against the estate were barred. We have now to meet that question, and we answer it in the affirmative.

This is a bill seeking relief against a former decree of the court in which it is exhibited, which was obtained by what the law regards as fraud and imposition, even though the action of the party obtaining it was ever so honest in fact. "A decree obtained without making those persons parties to the suit in which it is had, whose rights are affected thereby, is fraudulent and void as to those parties." Story Eq. Pl. § 427. Mrs. Osburn and Mrs. Bealmaer were not legally made parties to the suit. The infant defendants are entitled to impeach the decree, because it is improper, although it was not obtained by fraud or surprise, independently of the question of whether they were parties to the suit or not. Story Eq. Pl. § 427. The parties against whom relief is sought are not *bona fide* purchasers under the decree, but are the administrator who procured it, and his confederate in the purchase of the land at the sale which we have heretofore pronounced voidable at the election of the complainants in this bill. This is an application by original bill to the court which granted the decree for relief against that decree, and the rights of no innocent person are involved.

The recitals in the decree for the sale of the land, as to service of process and proof of publication, are *prima facie* true. In this proceeding they are not conclusive. In a collateral proceeding these recitals would be conclusive, because, in such case, they could not be shown to be untrue, except by the record. Not being liable to attack in a collateral proceeding, their *prima facie* character would amount to conclusiveness, but in this proceeding the recitals of the decree may be contradicted, and, if shown to be untrue, the decree resting upon them for its validity should be opened. It is not to be tolerated, that, because the record may show the concurrence of those facts essential to give the court jurisdiction of a party, he may not, in a proper proceeding in the same court, and against the other parties, show its falsity. It is not to be assumed that a record is false, and yet it may be, and sometimes is, and when shown to be so in a proper proceeding, and between proper parties, the truth must prevail, though the record falls. If, in its fall, no one is harmed, except the one who procured a false record to be made, or those in his shoes



with notice, no wrong is done, and right prevails. We acted on this doctrine in *Crawford v. Redus*, 54 Miss. 700, which is said by counsel to be at variance with all the previous decisions of this court on this subject.

We do not agree with counsel as to former adjudications. As we understand them, they announce the correct doctrines to which we steadfastly adhere, that every presumption is to be indulged in favor of the record of a court of general jurisdiction, and that it cannot be controverted in a collateral proceeding. Want of jurisdiction is as fatal to the proceedings of one court as to those of another. No court can render a valid judgment without jurisdiction. It is said that "it is not to be assumed that a court of general jurisdiction has in any case proceeded to adjudge upon matters over which it had no authority; and its jurisdiction is to be presumed, whether there are recitals in its records to show it or not." Cooley Const. Lim. 406. It is a presumption founded on an assumption. But suppose, in a direct proceeding for that purpose, the fact is demonstrated that this assumption is not correct, what becomes of the presumption? We say that every presumption is to be indulged in favor of the jurisdiction of courts of record, and that their recitals are *prima facie* true, and they cannot be questioned in a collateral proceeding; but when directly questioned, in a proper proceeding for that purpose, the truth must prevail, whether the court be of the one grade or the other in the classification of courts. We adhere to *Crawford v. Redus*.

The appointment of Sivley as administrator *de bonis non*, with the will annexed, was not void. The fact that notice was not given to the legatees of the surrender of his trust by Summers, as executor, did not hinder the court from accepting the surrender by him, and appointing a successor in the administration of the estate. Notice to distributees or legatees of a surrender of his trust by an executor or administrator is a condition precedent to a valid settlement with the court of the administration account of the person resigning, but the statute, § 1122 of the Code, is not inconsistent with the right of the court to accept a resignation and appoint a successor at once, requiring the outgoing executor or administrator to give

notice and make settlement, until which he remains liable on his bond.

It appears that Drone alone is entitled to be considered a creditor of the estate of Summers at the time of the sale of the land. It is objected that he did not buy in good faith, and that the purchase-money was not applied in good faith to payment of debts, and that nothing should be allowed against the land, on account of the indebtedness of the estate to Drone. Our view is that, in setting aside the sale of the land, the *status quo* of the parties, as nearly as possible, should be restored, and that, as Drone was at the time a creditor of the estate, he should still be so regarded, with the right to charge the third of the land sold and now in controversy in this suit, with one-third of his claim against the estate. We do not think the claim for improvements is allowable, but the defendants should not pay increased rent caused by improvements for which they paid, and are denied compensation. *Tatum v. McLellan*, 56 Miss. 352. The taxes paid by the respondents, except for the year 1877, should be allowed. Taxes were assessed, and the land would have been sold if the taxes had not been paid, and the complainants must do equity.

*Reversed and remanded.*

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JULIUS MENKEN ET AL. v. SAMUEL FRANK ET AL.

1. INJUNCTION BOND. *Breach of condition. Extent of recovery.*  
Indemnity for breach of an injunction bond, which is broader than the statute requires, may be allowed so far as the condition is legal, but not beyond what could be recovered if the bond conformed to law.
2. SAME. *Illegal condition. Breach.*  
The bond is not vitiated by the excess in the condition, but no recovery can be had for a breach of that part of the condition which is not according to the statute providing for such bond.
3. SAME. *Remedy in equity.*  
The obligees may recover in equity, to the same extent that they would have been entitled to recover on the bond at law, if it had been conditioned as prescribed by the statute.

ERROR to the Circuit Court of Marshall County.

Hon. J. W. C. WATSON, Judge.

The plaintiffs in error sued the defendants in error on a bond executed by the latter in a proceeding instituted by one of them to enjoin a sale under a deed of trust made by A. L. Hill to secure a debt due the former. The bond was conditioned as provided by Code 1871, § 1044, to stay proceedings at law, and not as directed in § 1045, to obtain injunctions for other purposes, and the breaches assigned were of the part of the condition to pay the money due, which was required by the former statute, but not by the latter. A demurrer was sustained on the ground that the part of the condition sued on was voluntary and void.

*E. M. Watson*, for the plaintiffs in error.

The bond, although it does not follow the statute, is good as a common-law obligation. Such variance cannot avail the defendants, who voluntarily executed the bond, which was approved by the clerk without the obligees' agency. *State v. Cooper*, 53 Miss. 615; *Ring v. Gibbs*, 26 Wend. 502; *Morse v. Hodsdon*, 5 Mass. 814; *Johnson v. Laserre*, 2 Ld. Raym. 1459; *Van Deusen v. Hayward*, 17 Wend. 67; *Treasurers v. Bates*, 2 Bailey (S. C.), 362; *Williams v. Shelby*, 2 Oregon, 144; *United States v. Maurice*, 2 Brock. 96; *Drake on Attachment*, § 151. The suspension caused by the injunction is the consideration. *High on Injunctions*, § 951. The extent of liability depends on the express agreement of the parties. *Willson v. McEvoy*, 25 Cal. 169. The defendants, having tendered the bond sued on, which was accepted, must stand by its terms. If the recovery is too large, their remedy is in equity. *Hanley v. Wallace*, 3 B. Mon. 184.

*Manning & Watson*, on the same side.

*Featherston & Harris*, for the defendants in error.

That part of the condition of the bond on which the breaches are assigned is voluntary and void, and unauthorized by law. Property covered by the deed of trust remains, and payment of the debt must be enforced out of it. *High on Injunctions*, §§ 949, 950; *Johnson v. Vaughan*, 9 B. Mon. 217; *Hanley v. Wallace*, 3 B. Mon. 184; *Dixon v. United States*, 1 Brock. 177. As the statute authorizing the bond to be given is the basis of

the contract, the obligees must take notice of it. *Mygatt v. Green Bay*, 1 Biss. 292. A condition inserted in the bond, if not required by law, is a nullity. *State v. Bartlett*, 30 Miss. 624; *Hicks v. Mendenhall*, 17 Minn. 475. If the clerk takes an insufficient injunction bond, the complainants' remedy is ample. Code 1871, § 1044; High on Injunctions, §§ 949, 952.

CAMPBELL, J., delivered the opinion of the court.

The bond sued on in this action is not void because the condition is broader than the statute required, but no recovery can be had on it for an alleged breach of such part of the condition as is not provided for by the statute. Code 1871, § 1045. The breaches of the condition of the bond assigned in the declaration are founded on that part of the condition not required or authorized by law. We have examined the authorities cited by counsel, and deduce as the true rule on this subject that a bond given in a legal proceeding, which is conditioned for more than the law provides, is good to the extent that the condition is according to law, and is not vitiated by the excess, but that no recovery thereon can be had beyond what could have been recovered if the bond conformed to law. The plaintiffs are seeking to recover their debt due from A. L. Hill on the bond given by the defendants to enjoin the sale of property, because in drawing the bond it was conditioned to pay the debt, when the law required a bond conditioned, not for payment of the debt, but only for damages and costs. To the extent that the bond was conditioned to pay the debt secured by the deed of trust, the execution of which was enjoined, it was beyond the requirement of the law, and it would be improper to hold that, because of the mistake in the bond, a recovery on it could be had for what, if the bond had been according to law, could not be recovered. The plaintiffs, being unable to recover on the bond at law, may resort to a court of chancery, and there recover to the same extent that they would have been entitled to recover on the bond at law, if it had been conditioned as prescribed by the statute.

*Judgment affirmed.*

## F. B. POTTS v. J. W. HINES.

1. CIRCUIT COURT. *Jurisdiction. Amount in controversy.*

In the absence of an attempt to evade the constitutional limitations, a suit in the Circuit Court for five hundred dollars should not be dismissed because the plaintiff testifies that an account for a sum under the jurisdictional limit is correct. *Fenn v. Harrington*, 54 Miss. 738.

2. LIMITATION OF ACTIONS. *Suit to stop statute. New party. Amendment.*

A suit against the guardian of a lunatic will not stop the running of the Statute of Limitations in favor of the latter, against whom no recovery can be had, if the account is barred pending the suit, although he is subsequently made a party by amendment.

3. SAME. *Account stated. New promise.*

A verbal acknowledgment of the correctness of an account, making it an account stated, will not avoid the Statute of Limitations of three years applicable to open accounts. *Floyd v. Pearce*, ante, 140, cited.

ERROR to the Circuit Court of Marshall County.

Hon. J. W. C. WATSON, Judge.

This action brought March 1, 1876, against J. R. McCall, guardian of F. B. Potts a lunatic, for five hundred dollars, alleged to have been paid Jan. 1, 1874, in satisfaction of a note for that amount, was amended April 23, 1877, by filing against "F. B. Potts, a lunatic, whose guardian is J. R. McCall," a declaration containing six counts, each for five hundred dollars, and the last for merchandise sold Potts while sane. Process was then, for the first time, served on the lunatic. A demurrer to the first five counts was sustained, and another count was then filed alleging an account stated for the same sum. The defendant pleaded *non assumpsit* and the Statute of Limitations of three years, to the latter of which, so far as applicable to the seventh count, a demurrer was sustained. The verdict was for one hundred and forty-six dollars and seventy-nine cents, with interest, and the circuit judge, certifying that the plaintiff had reasonable ground to expect to recover more than one hundred and fifty dollars, gave judgment for the debt and costs.

On the trial, the plaintiff, having testified that a bill of particulars, for one hundred and forty-six dollars and seventy-nine cents, filed with the seventh count, was correct, the defendant

moved to dismiss the case, but his motion was overruled. The plaintiff then mentioned two additional items, which by leave of court were added, increasing the bill of particulars to one hundred and fifty-five dollars. He also testified that, to take up his aforesaid note payable to the "guardian of F. B. Potts," he had receipted the account filed as a bill of particulars, and paid the remainder of the five hundred dollars in cash, but that the note turned out to be without consideration. He testified further that, in December, 1873, Potts while sane bought from him some corn, which was added to the amount then due, that they agreed upon one hundred and fifty-five dollars, and Potts then promised to pay that specific sum.

*Watson & Smith*, for the plaintiff in error.

1. When the first five counts for money paid by the plaintiff to the lunatic's guardian, and by him used for the lunatic, were under the former opinion (*Hines v. Potts*, 56 Miss. 346) demurred to and the demurrer sustained, the only remaining counts were the sixth and seventh, which, although they each claimed five hundred dollars, were really both for the one hundred and forty-six dollars and seventy-nine cents' worth of merchandise bought by the defendant prior to his lunacy. When this fact was developed by the testimony, the motion to dismiss for want of jurisdiction should have been sustained. Although the court has jurisdiction at the beginning of a suit, it may be lost at some subsequent stage. *Wolley v. Bowie*, 41 Miss. 553. The allowance of the amendment so as to increase the sum demanded to one hundred and fifty-five dollars could not give jurisdiction.

2. The Statute of Limitations of three years applied to this claim, for the parol acknowledgment making it an account stated did not avoid the bar. *Floyd v. Pearce*, ante, 140. By the amendment, the suit was for a different cause of action and against a new party. *McCall v. Nave*, 52 Miss. 494. The statute continued to run in the lunatic's favor against the new matter, until the amendment. *Anderson v. Robertson*, 32 Miss. 241; *Brown v. Goolsby*, 34 Miss. 437; *Dinkins v. Bowers*, 49 Miss. 219; *King v. Avery*, 37 Ala. 169; *Miller v. McIntyre*, 6 Peters, 61; *Dudley v. Price*, 10 B. Mon. 84; *Crofford v. Cothran*, 2 Sneed, 492.

*E. M. Watson*, for the defendant in error.

1. As the court had jurisdiction at the inception of the case, it could not be lost by the amendment. *Bank of Vicksburgh v. Jennings*, 5 How. 425; *Read v. Renaud*, 6 S. & M. 79. The new items were proved and the jurisdiction established. If the testimony could oust the court of jurisdiction, it could be re-established by the same means. The only criterion of jurisdiction, however, is the amount claimed in the declaration. *Fenn v. Harrington*, 54 Miss. 733.

2. This case does not fall within the rule of *Floyd v. Pearce*, ante, 140. In this there was a new consideration. The corn passing at the time, a new contract was made, and the old indebtedness was extinguished. The amendments of the declaration and bill of particulars were merely formal. The same subject-matter is embraced from the first. The declaration was originally for the consideration of the five hundred dollar note, next for the money paid and an itemized account receipted to take up that note, the last bill of particulars is the account without the money, and the items added on the trial were those inadvertently omitted from the account. From the beginning, the suit was based on the same transaction, and was for the same cause of action. The lunatic was a real party from the inception, although the process was first served on his guardian under the statute.

*Manning & Watson*, on the same side.

CAMPBELL J. delivered the opinion of the court.

The motion to dismiss the case for want of jurisdiction was properly refused. *Fenn v. Harrington*, 54 Miss. 733. The action was not commenced as to Potts until he was made a party by amendment. Until then, he was a stranger to the action, and would not have been affected by a judgment in it. In suits against lunatics, both the lunatic and his guardian must be served with process. Code 1871, § 705. Before he was made a defendant, the account was barred by the Statute of Limitations of three years, which upon the facts disclosed in evidence applied to it. *Floyd v. Pearce*, ante, 140. The verdict should have been for the defendant below.

*Reversed and remanded.*

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THE STATE, USE, ETC. v. S. A. STORY, ADMINISTRATRIX, ET AL.

ACCORD AND SATISFACTION. *Joint creditors. Settlement with one.*

Accord and satisfaction with the nominal plaintiff in a disputed judgment, who is one of the uses therein, bars an action for the amount of the judgment by the other uses.

ERROR to the Circuit Court of Tippah County.

Hon. J. W. C. WATSON, Judge.

This action on the bond of the administratrix of Robert Story, for the use of Eliza Furdick's heirs by her first marriage, was to recover the amount of a judgment against the administratrix in favor of Eliza Furdick and her present husband, for the use of herself and those heirs. The defendants pleaded accord and satisfaction. The judgment sued on, which was based upon Robert Story's note, payable to Eliza Furdick, for the use of herself and the heirs, had been disputed and compromised by the payment to her of a sum less than the judgment, which she agreed to and accepted in full settlement.

*Falkner & Frederick*, for the plaintiff in error.

A person who brings a suit for another's use cannot discharge the debt by agreement with the defendant. *Emmons v. Myers*, 7 How. 375; 2 Parsons on Contracts, § 617. The nominal party has no control over the suit. *Eckford v. Hogan*, 44 Miss. 398. Payment of a sum less than the demand to a joint plaintiff is no discharge against the others. *Clark v. Dinsmore*, 5 N. H. 136; 2 Parsons on Contracts, §§ 614, 684; 2 Story on Contracts, § 982. Part payment is not a discharge without a new consideration. 2 Parsons on Contracts, § 618.

*B. F. Worsham and Charles Carter*, for the defendants in error.

Eliza Furdick was not only the payee in the note on which the judgment was founded, but the proceeds belonged to her and the heirs. She had the right to compromise, and, as the matter was disputed, the consideration was sufficient, and the settlement binds all the parties. *Long v. Shackleford*, 25 Miss. 559; *Field v. Weir*, 28 Miss. 56.



CAMPBELL, J., delivered the opinion of the court.

This case presents the question whether the settlement of a disputed claim, by payment of a sum less than the demand to one of the joint creditors, is a bar to an action on such claim, and we agree with the learned judge of the Circuit Court in holding the affirmative of this question.

A compromise of a disputed matter binds both parties. *Long v. Shackleford*, 25 Miss. 559. A payment to one of several joint creditors, or an accord and satisfaction with one of the plaintiffs, is good, without showing that the plaintiff who made the settlement had authority from the others to make it. *Wallace v. Kelsall*, 7 M. & W. 264; *Husband v. Davis*, 10 C. B. 645; *Morrow v. Starke*, 4 J. J. Marsh. 367; *Wright v. Ware*, 58 Ga. 150; *Weston v. Weston*, 35 Maine, 360; 2 Chitty on Contracts, 1182. Mrs. Furdick, with whom it appears that the settlement of the judgment was made, was not merely a nominal plaintiff, but was one of the usees, being one of the payees of the note sued on, and the settlement made with her of the judgment extinguished it as a cause of action.

*Judgment affirmed.*

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## H. C. PINDELL, EXTR., v. HELEN J. HARRIS ET AL.

### 1. LIMITATION OF ACTIONS. *Absence from and residence out of State.*

Under the second clause of Code 1871, § 2157, a person, who, after a cause of action has accrued against him, removes and resides out of the State, is entitled, in computing the bar of the Statute of Limitations, to the benefit of the time spent here on subsequent visits, open, notorious and long enough for suit.

### 2. SAME. *Successive absences. Running of statute.*

Such person cannot claim that because of his visit to the State his subsequent absences are to be disregarded, and the statute to run continuously, for the rule announced in *Ingraham v. Bowie*, 33 Miss. 17, is altered by the second clause of Code 1871, § 2157. *Wühers v. Bullock*, 53 Miss. 539, cited.

### 3. SAME. *Absence and non-residence both essential.*

The clause refers to those who, residing here when the right of action accrues, thereafter remove, and are absent from and reside out of the

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State ; and, if the debtor either retains his residence or is present here, the statute continues to run in his favor.

4. **SAME.** *Transient or clandestine visit.*

The time of the debtor's merely passing through the State, or coming into it for a few hours or days each week or month, or his furtive, clandestine, or transient presence here, cannot be estimated in his favor.

5. **MARRIED WOMEN.** *Promise to pay antenuptial debt.*

*Quære*, Can a married woman bind herself or property by a promise to pay an antenuptial debt.

APPEAL from the Chancery Court of Sharkey County.

Hon. W. G. PHELPS, Chancellor, having been of counsel, W. A. PERCY acted as Chancellor *pro hac vice*.

*W. G. Phelps*, for the appellant.

1. The promise to pay the antenuptial debt is valid. The power is a consequence of our legislation, and is embraced in the spirit of the married woman's law. 1 Bouvier's Law Dic. 49; *Foster v. Allanson*, 2 T. R. 483; *McDowell v. Wood*, 2 Nott & McCord, 242; *Memphis Railroad Co. v. Scruggs*, 50 Miss. 284; *Travis v. Willis*, 55 Miss. 557; Angell on Lim. § 150; *Viser v. Scruggs*, 49 Miss. 705; Tyler on Infancy and Coverture, §§ 217, 234; Clancy on Married Women, 13. The defendant is also estopped to set up her incapacity by retaining the property until it is valueless, worn out or destroyed. *Shivers v. Simmons*, 54 Miss. 520.

2. Remedy is not barred because, owing to Mrs. Harris's residence in Tennessee, the Statute of Limitations did not run. Code 1871, § 2157. The period during which she was in this State as a mere visitor cannot be counted in her favor. Her answers upon this point, where indefinite, must be construed most favorably to the appellant. *Tarpley v. Wilson*, 33 Miss. 467; Story Eq. Pl. § 854; 1 Dan. Ch. Prac. 724. Under statutes identical with ours, the construction contended for has been adopted in other States. In *Rockwood v. Whiting*, 118 Mass. 337, Gray, C. J., said: "By the well-settled construction of the Gen. Sts., c. 155, § 9, and of the statute of New York from which it was taken, a person who has a domicile and actual residence in another State, and only comes into this State occasionally, or even for a few hours daily, is 'absent

from and resides out of the State,' and the Statute of Limitations does not run in his favor;" citing *Milton v. Babson*, 6 Allen, 322, and *Burroughs v. Bloomer*, 5 Denio, 532. In the latter case, decided under the New York statute, which has the words, "shall depart from and reside out of the State," it is said that "the statute *ceased to operate* as long as the defendant continued to *reside* abroad." The question was raised in this State in the case of *Withers v. Bullock*, 53 Miss. 539, and while probably not directly decided, the language of the court seems to be in accord with the above decisions. In this case, however, the old case, cited by the defendants, of *Ingraham v. Bowie*, 33 Miss. 17, is held not to apply to the present statute. If the rule, for which the appellees' counsel contend, is applicable, the bar can never be proved complete. How was it possible for the complainant or any other creditor to know that Mrs. Harris was here? Such knowledge must be proved as to occasional visits. *Crosby v. Wyatt*, 23 Maine, 156. How, by any diligence short of a dogging spy upon her every movement for years, could the complainant learn of her coming here, and be prepared with process to serve upon her? She was a resident of Memphis with her husband. The burden shifted, when the appellant proved that Mrs. Harris permanently removed from the State in October, 1871. The presumption of law then came to his aid, that she remained absent, as the proof placed her. Then it became the duty of the defendants to rebut that presumption, and show affirmatively that she was in the State afterwards long enough to fix the bar. And this result would also follow under the general rule that, where the facts are peculiarly within the knowledge of the defendant, he must make the proof. 2 Greenl. Evid. § 79.

*T. C. Catchings*, on the same side.

A married woman who owes a debt which is enforceable against her, and which rests in open account, can change the form of the debt by giving her note. At times it may be highly beneficial to her to obtain an extension of credit from her antenuptial creditors. This proposition counsel discussed at great length, citing, among other authorities, *Orcutt v. Berrett*, 12 La. Ann. 178; *McNair v. Stanton*, *ante*, 298; and

*Floyd v. Pearce*, ante, 140; contending also that, even if the written promise is inoperative as a security for money, it is still an acknowledgment sufficient to take the case out of the statute. *Utica Ins. Co. v. Kip*, 8 Wend. 369. The second point the counsel did not argue, but, upon the proposition that Mrs. Harris's testimony as to the time of her absence must be taken most strongly against her, he cited *Kennedy v. Shea*, 110 Mass. 147.

*Miller & Hirsh*, for the appellees.

1. Upon the face of the note, the bar was complete before the filing of the bill. It devolved upon the complainant to show that the defendants had been absent from and resided out of the State a sufficient length of time to avoid the bar. He sought to do this by the evidence of the defendants, which he claimed must be taken most strongly against them. The true rule is that the complainant must establish the exception by proof. But in no view can the exception be maintained upon any reasonable construction of the evidence. *Withers v. Bullock*, 53 Miss. 539, announces that the rule under which *Ingraham v. Bowie*, 33 Miss. 17, was decided, has been changed, and states that the last clause of the statute "applies to one who shall be absent from and reside out of the State." The court fails to say what is the "different rule" introduced, and leaves that to be ascertained from the language of the statute, and its reason and policy. As to the latter, Statutes of Limitations are statutes of repose, are favored by the courts, and exceptions to them are strictly construed. The literal language of the statute requires that, "if after any cause of action shall have accrued" it shall be sought to avail of the exception, then both absence and non-residence must concur. Neither, alone, will do. If the defendant is personally present in the State, service of process can be had on him personally; if absent from the State, but still a resident, service of process can be had by leaving a copy of the summons at his usual place of abode. By § 1783, Code 1871, if summons for the husband be returned "not found," the suit may be prosecuted against the wife alone. In the cases cited by counsel, the policy of limitation does not seem to have met with favor or even consideration, and we respectfully submit that, if literal

language is to be departed from, there could be no safer guide than the policy of the act in question. In *Hall v. Nasmith*, 28 Vt. 791, it was held that absence from and residence out of the State were necessary to raise the exception, and that only the time when both concurred should be deducted from the statutory period. Certainly the rule in Mississippi must be the same, unless we assume that non-residence and absence are the same thing, and it requires what we conceive to be an unwarranted refinement of construction to support this assumption.

2. A married woman cannot by a written acknowledgment of an antenuptial debt bind herself so that she cannot plead the bar of the statute which subsequently attaches. Tyler on Infancy & Coverture 317; 1 Greenl. Evid. § 127. The *feme covert* is still subject to her common-law disabilities, except as to the class and subject of contracts enumerated in the statutes. *Whitworth v. Carter*, 43 Miss. 61; *Foxworth v. Magee*, 44 Miss. 430; *Mallett v. Parham*, 52 Miss. 921. The case at bar does not fall within the exceptions created by the statutes; they are silent upon the subject. *Travis v. Willis*, 55 Miss. 557.

*Frank Johnston*, on the same side.

Mrs. Harris could not take the case out of the Statute of Limitations by promising to pay her antenuptial debt. Code 1871, § 1780. *Reinhardt v. Hines*, 51 Miss. 344; *Hawkins v. Long*, 74 N. C. 781; *Davis v. Foy*, 7 S. & M. 64; *Mallett v. Parham*, 52 Miss. 921; *Nelson v. Miller*, 52 Miss. 410. The contract being void at common law, and the separate estate at common law being bound for the original antenuptial debt, there is no statute which confers upon the wife the power previously unknown of contracting in respect of this class of debts. *Travis v. Willis*, 55 Miss. 557; *Klotz v. Butler*, 56 Miss. 332. No implied ratification resulting from Mrs. Harris's having kept the property can make this debt one contracted during coverture.

CHALMERS, J., delivered the opinion of the court.

The suit is against a married woman upon a stated account with written promise to pay executed by her after marriage as to a debt contracted before marriage. The question is much

discussed by counsel whether a married woman can bind herself or her property by a promise to pay an antenuptial debt, it being insisted, on the one hand, that, as she could not do so at common law and is not empowered to do so by statute, all such contracts are necessarily void; and, on the other, that, as the antenuptial debt is itself binding, there can be no valid objection to her renewing the obligation, inasmuch as the common-law reason, that by so doing she imposes a prolonged liability upon her husband, does not exist with us.

The question is interesting, but not deemed necessary to be decided, since, conceding the power, and treating the written acknowledgment and promise as equivalent to a promissory note, we are of opinion that it is barred by the Statute of Limitations. It was executed in 1865, at a time when the Statute of Limitations was suspended in this State. The statute began to run on April 2, 1867, at which time Mrs. Harris resided here. She continued to reside here until October, 1871, when she removed to Memphis, Tennessee. Four years and six months elapsed from the time when the statute was set in motion until her removal from the State. She returned to the State in April, 1873, and resided here for fifteen months and a half, and then again returned to Memphis, where she has since continued to reside. The two periods together aggregate five years, nine months and a half, being two months and a half short of six years. In 1872, while confessedly a resident of Memphis, she visited her mother, with whom she had always previously resided, at her home in Madison County in this State, and there remained for from three to five months. If the period of this visit is to be counted in her favor, or is to be deducted from the time when she is to be regarded in the language of the statute as "absent from and residing out of the State," then the bar of the statute in her favor is complete, — otherwise not.

The statute (Code of 1871, § 2157) declares, "if, after any cause of action shall have accrued, the person against whom it has accrued shall be absent from, and reside out of the State, the time of his absence shall not be taken as any part of the time limited for the commencement of the action." The clause refers to those who, residing here when the right of

action accrues, shall thereafter remove elsewhere. It declares that the time during which they are absent, so residing elsewhere, shall not be taken as forming any portion of the period of limitation. Two things, therefore, it would seem, must concur before the creditor can deprive the debtor of the benefit of the flow of time, viz. residence elsewhere and actual absence from this State. If the debtor, retaining his residence here, is temporarily absent, the statute continues to run in his favor. If, residing elsewhere, he is actually present here, the same result ensues. We do not mean by this that a furtive, clandestine or transient presence here would avail the debtor. Merely passing through the State, or coming into it for a few hours or days each week or month, would not suffice. Such presence would not afford the creditor an opportunity to sue, and would require calculations of time, with a view of determining the whole period spent here, so difficult as to be impracticable. But where the presence here has been open, notorious and continuous for weeks or months, to allow the creditor to disregard it would seem to be a violation of the letter of the statute which permits him only to ignore the time during which the debtor has been absent from and resided out of the State. It is the period of absence that he is permitted to deduct. The time of presence must be counted, unless it be secret or evanescent in its character.

Our statute is similar in language to those of New York, Massachusetts and Vermont. In the first two States a construction different from that here announced has been put upon it, though in both States the cases in which the point was decided were instances of daily visits lasting only a few hours, the debtors returning at night to their homes in the foreign States. In Vermont a conclusion similar to our own was reached, the court saying, however, that there must be a continued residence or commorancy in the State upon the part of the returning debtor; that is to say, a stay continuous, not fitful, — an abiding which is fixed, though temporary in its character. *Hall v. Nasmith*, 28 Vt. 791.

We think the visit of Mrs. Harris to her former home in 1872, and her stay there of three or five months, come fully up to the requirements here laid down, that she is entitled to

have it computed in her favor, and consequently that the suit is barred.

In *Ingraham v. Bowie*, 33 Miss. 17, it was held under the provisions of Hutch. Code, p. 831, § 11, that the Statute of Limitations once set in motion by a debtor's return to the State would thereafter run on continuously in his favor, notwithstanding repeated subsequent absences by him. In *Withers v. Bullock*, 53 Miss. 539, we held that this rule was abrogated by the Codes of 1857 and 1871, and that a debtor could not now claim that, because he was once openly and notoriously in the State, his subsequent absences were to be disregarded, and the statute to run on continuously in his favor. The point now decided, namely, as to whether the debtor who has departed from the State can claim the benefit of the time spent here on subsequent visits when his presence has been open, notorious, and sufficiently long to afford the creditor an opportunity to bring suit, has not heretofore been determined in this State. We have given it the consideration which its practical importance demands.

*Decree affirmed.*

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LOUIS HOFFMAN v. ALEX. KUHN ET AL.

1. PARTY WALL. *Adjoining houses. Effect of their destruction.*

While the houses stand on either side of a party wall, neither proprietor can do any act to impair the other's property, and either is at liberty to keep the wall in order; but if the houses are accidentally destroyed each is owner in severalty of his own soil, and may dispose as he pleases of so much of the wall as stands thereon.

2. SAME. *Rebuilding. Injunction. False issue. Estoppel. Costs.*

If one of the proprietors attempts to rebuild to the wall, the other can enjoin him; and while the latter is not estopped to rely upon the destruction without his fault of the houses, by having tendered the false issue that the wall is unsafe, he is liable for the additional costs occasioned thereby.

APPEAL from the Chancery Court of Warren County.

Hon. UPTON M. YOUNG, Chancellor.

*Shelton & Crutcher*, for the appellant.



After the fire, the appellant had the right to remove the wall from his lot, the easement of the appellees therein having ceased. The easements which the owners of adjoining lots have in the party wall upon which their buildings rest last only so long as the buildings which were erected upon the wall under the agreement continue to exist, and remain fit for the use for which they were originally erected. When the buildings are destroyed, or rendered unfit for that use, these easements cease, and each proprietor holds his land and his share of the wall freed from the servitude in favor of the adjoining owner; and neither can rebuild upon the wall, so as to again subject the other's land to the servitude, without his consent. *Partridge v. Gilbert*, 15 N. Y. 601; *Sherred v. Cisco*, 4 Sandf. 480; *Dowling v. Hennings*, 20 Md. 179; *Hieatt v. Morris*, 10 Ohio St. 523; *Hunt v. Ambruster*, 17 N. J. Eq. 208. As there was no statute on the subject when this wall was built, the provisions of the Codes of 1857 and 1871 are inapplicable. The statute (Code 1871, § 1917), being in derogation of the common law, must be strictly construed, and does not accord with the facts of this case. The common law must therefore govern. All the rights of the owners of party walls are, in the absence of local legislation, dependent upon the agreement of the parties. There is no such common-law right. At common law, every man is the absolute owner of his own land, and no other person can subject it to any servitude, or claim any right therein, unless by his consent, or by prescription, which always presumes a grant; and that grant must have some definite limit, and result from some definite agreement. What that agreement was can only be inferred from the circumstances. Where, therefore, we find adjoining houses built upon a common wall resting equally upon the lands of the adjoining proprietors, the only inference we can draw is, that the easements of the respective proprietors in the wall apply only to the particular buildings which were built, and which we find resting upon it. We cannot presume that the wall was originally erected as something separate, distinct and complete in itself, but simply as a part of the buildings which the parties were erecting on their lots, and for the convenience of each party. The consideration, then, upon which

each owner is supposed to have given his share of the land and paid his share of the expense of building the wall was, that he was to have the use of it as a part of the particular building he was then erecting on it, and neither was bound by the compact to subject his land longer to the servitude. It is also true that the wall was not safe, as shown by the evidence, and for that reason it should have been removed.

*Miller & Hirsh*, for the appellees.

An easement or servitude is a right which one proprietor has to some profit, benefit, or lawful use, out of or over the estate of another. *Ritger v. Parker*, 8 Cush. 145. The easement of the appellees in this case was the right to use Hoffman's half of the wall to support their building. It was mutual, for Hoffman had the same right to use theirs. The wall then being safe and sound, and both parties enjoying the absolute right to repair or rebuild their own houses at pleasure, how can it be justly said that these easements were destroyed? The easement is the right to use the wall, not to control the building operations of the other proprietor. As long as the wall remains, the easement exists. If the defendants' easement remains and they insist that the wall is not materially injured, then Hoffman's is also subsisting. His right to use the defendants' half of the wall is not denied. It is insisted that Hoffman has the right to remove by reason of his absolute dominion over his own property. It must be conceded that the defendants enjoy an equal right of dominion over their property, and yet the complainant seeks to remove not only his own part of the wall, but that of the defendants also. He has no such power. *Eno v. Del Vecchio*, 4 Duer, 53; *Potter v. White*, 6 Bosw. 644; *Phillips v. Bordman*, 4 Allen, 147. The cases cited by opposing counsel support this view rather than that for which they contend. *Partridge v. Gilbert*, 15 N. Y. 601; *Sherred v. Cisco*, 4 Sandf. 480; *Dowling v. Hennings*, 20 Md. 179. We gather from them that the owners of party walls are burdened by certain obligations to each other, which they cannot arbitrarily ignore; that whether they own the wall as tenants in common, or each owns one half in fee simple and has an easement in the other half, this ownership or easement cannot be destroyed or brought to an

end by one proprietor removing the party wall without the other's consent, unless the condition of the wall justifies it. These principles are consonant with common sense and justice. Washburn on Easements, 536, 546. It is apparent that the complainant regarded the condition of the wall as an essential ingredient in his case. Hence his allegation that it was unsafe, and the testimony he has introduced to sustain it. As it is not proved that the party wall is either destroyed or unfit for use, he is unable to bring his case within the rule announced by the authorities. The issue raised and tried was whether the wall was materially injured. The Chancellor was never called on to try the question attempted to be raised here.

CHALMERS, J., delivered the opinion of the court.

The complainant and the defendants were the owners of adjoining lots in the city of Vicksburg, upon each of which stood brick buildings connected by a party wall, one half of which rested on either lot. The buildings had been so constructed more than twenty years before, by one who then owned both lots; and in consequence of sales by him to different persons, they had become by subsequent conveyances the property in severalty of the parties to this suit. On March 17, 1879, the building of the complainant was totally, and that of the defendants partially, destroyed by fire. The party wall was somewhat injured, but to what extent is a matter of dispute. Both parties were insured by the same company, and upon an estimate of damages made by experts, received payment from the company upon the basis that the party wall had been rendered useless and would have to be rebuilt. The defendants insist that they received their money from the insurance company in bulk and without knowledge that in so doing they obtained payment in full for one half the value of the wall. Shortly afterwards they began to repair or rebuild their house, using the old party wall for this purpose, whereupon the complainant filed this bill, enjoining them from so doing, alleging that the wall was unsafe and dangerous, and praying that it should be torn down and rebuilt from the foundation, if thereafter to be used as a party-wall. The defendants having

answered, averring the entire safety and trustworthiness of the wall, much testimony was taken on the subject, which seems to have satisfied the Chancellor that the wall was not materially injured and would subserve the purposes of new buildings similar to the old ones. He therefore dismissed the bill. We are not prepared to say that the Chancellor erred in his conclusion of fact, but we think that independently of the question of the condition of the wall, the complainant was entitled to the relief prayed, and it will not be denied him because he rested his claim to it upon improper grounds since it cannot be claimed, except as a matter of costs, that by so doing he has misled his adversary or occasioned any surprise to him. As he was, in our opinion, entitled, upon the destruction of his house, to put an end to the easement previously enjoyed by the defendants in so much of the wall as rested upon his lot, and to decline longer to treat the wall as a party-wall, his legal rights should not be prejudiced because he gave as a reason for desiring to do so the unsafe character of the structure.

The owners of adjoining buildings, connected by a party-wall resting partly upon the soil of each, are neither joint owners nor tenants in common of the wall. Each is possessed in severalty of his own soil up to the dividing line, and of that portion of the wall which rests upon it; but the soil of each, with the wall belonging to him, is burdened with an easement or servitude in favor of the other, to the end that it may afford a support to the wall and building of such other. Each, therefore, is bound to permit his portion of the wall to stand, and to do no act to impair or endanger the strength of his neighbor's portion, so long as the object for which it was erected, to wit, the common support of the two buildings, can be subserved; and each will consequently be liable to the other for any damage sustained by a disregard of this obligation. But the obligation ceases with the purpose for which it was assumed, namely, the support of the houses of which the wall forms a part. If those houses, or either of them, are destroyed without fault upon the part of the owner, he is not bound to rebuild in exactly the same style and in exactly the same spot because his neighbor demands it. That this is true where the

wall itself is swept away with the house, is settled by authority. *Partridge v. Gilbert*, 15 N. Y. 601; *Sherred v. Cisco*, 4 Sandf. 480. It must be equally so where the wall alone remains. A wall is but a portion of a house, and the one is valueless without the other. To hold that so long as the wall stands the owner whose house has been destroyed is compelled to lose the use of his lot or to replace the destroyed building with another of exactly the same pattern, is to sacrifice the greater to the less, and to impose in perpetuity a servitude which was assumed only for a specific purpose. Such a doctrine, if enforced in the growing towns and cities of America, where localities which are dedicated at one time to residences are swallowed up in a few years by the encroaching demands of trade, would be intolerable. If he who has, in conjunction with his neighbor, erected dwelling-houses with party-walls, is thereby obliged, as often as his residence is destroyed, to replace it with one of exactly similar pattern, it would seriously impair the value of property and impose fetters upon its ownership too rigorous to be endured. We think the obligation is only that so long as the houses stand, the owner of neither shall do anything to impair the property of the other, and either shall be at liberty to repair and keep in order the common wall; but when, without the fault of either, the houses are destroyed, the easement is at an end, and each becomes the owner in severalty of his own soil and of so much of the wall as stands upon it, with a perfect right to tear it down or dispose of it in any way he sees proper. The decree will be reversed and the cause remanded, with instructions to enter a decree for the complainant; but as the complainant, by tendering a false issue, is responsible for much of the costs incurred, the costs of the lower court will be divided, the appellees to pay costs of this court.

*Decree accordingly.*

## JOHN BLOOM v. THE STATE.

1. QUARANTINE. *Pilot. Incoming vessel. Duty to display flag.*

An indictment against a person for violating the sixth section of the quarantine law (Acts 1877, p. 64) by bringing a vessel into a port on the Gulf coast of this State, without displaying a flag at half-mast, must aver that he was a pilot at one of such ports, as the statute refers to local licensed pilots.

2. SAME. *What vessels subject to the requirement. Infected ports.*

The duty of pilots to so display the flag for the quarantine physician is not confined to vessels from infected ports, but embraces all incoming vessels, and an indictment for neglect thereof need not allege that the vessel has visited or departed from any infected port.

ERROR to the Circuit Court of Jackson County.

Hon. J. S. HAMM, Judge.

*W. P. & J. B. Harris*, for the plaintiff in error.

None but resident licensed pilots are within the statute. The indictment is defective in failing to state that Bloom was a pilot at the port on the Gulf coast, and that the vessel had visited or departed from an infected port. Acts 1877, p. 64, §§ 3, 6, 12. In defining the offence, the indictment must pursue the precise and technical language employed in the statute. *Anthony v. State*, 18 S. & M. 263; *Ike v. State*, 23 Miss. 525; *Scott v. State*, 31 Miss. 473; *Williams v. State*, 42 Miss. 328.

*J. B. Harris*, on the same side, made an oral argument.

*T. C. Catchings*, Attorney General, for the State, argued orally and in writing.

The first count in the indictment based on § 6 of the act of Jan. 31, 1877 (Acts 1877, pp. 65, 66), is clearly good. Bloom, although captain, was acting pilot, and so, by his own act, brought himself within the law. If only regular pilots residing at the port were intended by the law, its object could be defeated at any time by the master refusing to employ a pilot, and discharging the duties of that position himself. When he brought the ship into port, he was to all intents and purposes the pilot of the ship, since he had taken upon himself the duties of that post.

CHALMERS, J., delivered the opinion of the court.

The plaintiff in error was indicted for a violation of the sixth section of the act "more effectually to protect the health of the citizens of the State." (Acts 1877, p. 64.) This section makes it the duty of all pilots at the aforesaid ports (those on the Gulf coast of this State) bringing vessels into said ports to display a flag at half-mast at the fore, and to keep said flag in said position until such vessel shall have been visited by the quarantine physician. Severe penalties are prescribed for a violation of this duty. The indictment does not charge that the plaintiff in error was a pilot of or at any of the ports on our Gulf coast, and it is therefore defective and should have been quashed. It is "all pilots at the aforesaid ports bringing vessels into said ports" who are required to place the flag at half-mast, and not pilots coming in from sea or from points beyond the State. This is made evident by reference to the twelfth section of the act where it is declared that "every pilot bringing a vessel into a port of this State during the existence of quarantine, shall, so soon as he boards the same, furnish the master of such vessel with a copy of this act." Clearly the pilots referred to throughout the act are our own licensed pilots who go out to meet and conduct vessels into port. The indictment, instead of averring that the plaintiff in error was a pilot at one of our ports, seems to negative that idea. It charges that "John Bloom, while quarantine was established at Pascagoula, being then and there captain of and acting as pilot of the vessel Indianola did," etc. The words "then and there" fix the time and place of the offence, and there are no others which indicate that this captain and acting pilot of the Indianola was an official or a resident of our ports. The motion to quash should have been sustained. The other principal ground of the motion to quash, namely, that the indictment did not allege that the vessel had visited or departed from any infected port as prescribed by § 8, is not well founded. The duty of pilots to display flags at half-mast under § 6 is not confined to those bringing in vessels from infected ports, but applies to all incoming vessels.

*Judgment reversed and indictment quashed.*

## ABNER NORTROP, ADMINISTRATOR v. MATTHEW FLAIG.

1. PRACTICE. *Plea of non est factum. Affidavit by attorney.*  
Under Code 1871, § 687, an attorney can make affidavit for his principal to the latter's plea of *non est factum*.
2. SAME. *Judgment. Demurrer to replication.*  
Judgment final for the defendant is improper upon sustaining a demurrer to a replication, upon the ground that it concludes with a verification instead of to the country.
3. SAME. *Special demurrer. Conclusion of plea.*  
Such a defect is ground only of special demurrer, which is abolished by the act of March 5, 1878 (Acts 1878, p. 190).
4. SAME. *Bill for discovery at law. Certainty. Laches.*  
A bill for discovery, which is vague and uncertain and does not satisfactorily explain delay in making the defence, may, if filed without leave of court, be stricken out on motion.
5. SAME. *Judgment nil dicit. Amended declaration. Pleas.*  
If pleas to a declaration are applicable to the amended declaration, which makes no substantial change or new allegation, it is erroneous to render judgment *nil dicit*, although they are not filed afresh.

ERROR to the Circuit Court of Harrison County.

Hon. J. S. HAMM, Judge.

*R. Seal*, for the plaintiff in error.

It was proper for the defendant's attorney to make affidavit to the plea of *non est factum*. Code 1871, § 687. The bill of discovery was the only means of obtaining evidence essential to the defence. On sustaining a demurrer to a replication, the judgment is final. *Ross v. Sims*, 27 Miss. 359; *Memphis Railroad Co. v. Orr*, 52 Miss. 541. The pleas to the original declaration were applicable to the amended one. *Parisot v. Helm*, 52 Miss. 617.

*B. L. Posey*, for the defendant in error, argued orally and in writing.

Code 1871, § 687, is inapplicable to the plea in this case, which must be "verified by the oath of the party pleading the same." Code 1871, § 683. It was too late to file the bill of discovery, which upon its face is so vague and confused as to be inadmissible. Judgment final on sustaining the demurrer



could not be rendered, because the defect in the replication was formal. *Metcalf v. Grover*, 55 Miss. 145. As there were no pleas to the amended declaration, judgment *nil dicit* was proper. *Anderson v. Robertson*, 82 Miss. 241; *Shaw v. Brown*, 42 Miss. 809.

CHALMERS, J., delivered the opinion of the court.

A plea of *non est factum* was stricken out upon motion, because verified by the affidavit of the attorney instead of by that of the defendant, who, in this case, was the administrator of the maker of the writings sued on. Code 1871, § 687, declares that "in all cases where the oath or affirmation of the party is required, such oath or affirmation may be made by his agent or attorney, and shall be as effectual for all purposes as if made by the party." This section immediately succeeds those relating to the plea of *non est factum*, and while broad enough to cover, and doubtless intended to cover, affidavits of every character, would seem from the collocation of sections to be especially applicable to such pleas. However desirable it may seem that such pleas should be sworn to by the client, and however improper it may be that such affidavits should be made by attorneys, where no exceptional circumstances demanding or warranting it are shown, we must hold it admissible for them to do so by the plain letter of the statute. The action of the court in striking out the plea was erroneous.

The court did not err in failing to give judgment final for the defendant, when it sustained the demurrer to the plaintiff's replication. The ground of demurrer was that the replication concluded with a verification instead of to the country. This is ground only of special demurrer, and such demurrers are abolished by the Act of March 5, 1878 (Acts 1878, p. 190). Independently of the statute, it would be improper upon sustaining such a demurrer to a replication to give judgment final, as was held in *Metcalf v. Grover*, 55 Miss. 145. There was no error in striking out the bill filed for a discovery. It was filed without leave, was vague and unsatisfactory in its averments, and gave no sufficient reason for the delay since the inception of the litigation in bring-

ing forward the defence which it undertook to set up. It was erroneous to render judgment of *nil dicit* upon the amended declaration, because no new pleas had been filed to it. Two of the pleas to the former declaration, *non assumpsit* and payment, stood unaffected by the demurrer which had swept away the other pleadings in the case; and these pleas remained, therefore, applicable to the new declaration, and it was not necessary to file them afresh. It is only necessary to file new pleas where the amended declaration introduces new allegations, or makes a substantial change in the action. Such was not the case here. *Parisot v. Helm*, 52 Miss. 617.

*Judgment reversed and cause remanded.*

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JULIUS MENKEN ET AL. v. S. GUMBEL.

1. ATTACHMENT. *Interpleader. Judgment. Res inter alios acta.*

The judgment sustaining an attachment, upon the ground that the assignment of a fund in a garnishee's hands is fraudulent, does not bind the assignee upon the trial of the issue under his claim by way of interpleader.

2. ASSIGNMENT. *Balance to be settled. Attachment.*

Acceptance of an order to pay a specific sum out of any balance due on settlement with the drawer takes precedence of a garnishment in attachment against the drawer, which is served on the acceptor before settlement.

3. SUPREME COURT. *Practice. Agreed case. Judgment on reversal.*

Upon reversing the decision of a circuit judge to whom the case was submitted on an agreed statement of facts, the Supreme Court will direct the proper judgment to be entered.

ERROR to the Circuit Court of Yalobusha County.

Hon. J. W. C. WATSON, Judge.

J. J. Slack, for the plaintiffs in error.

The assignment is valid, and as it preceded the attachment the claimants are entitled to be first paid. *Swisher v. Fitch*, 1 S. & M. 541; *Farmers' Bank v. Douglass*, 11 S. & M. 469; *Surget v. Boyd*, ante, 485. The plaintiffs in error are in no manner bound by the verdict, to which they were not parties.

The accepted order was an assignment *pro tanto*. In the case of *Manderville v. Welch*, 5 Wheat. 277, the court said that if an order drawn against a particular fund is accepted, it amounts to an assignment of that much of the particular fund. The same doctrine was held in *Munger v. Shannon*, 61 N. Y. 251; *Ehrichs v. DeMill*, 75 N. Y. 370; *Spofford v. Kirk*, 97 U. S. 484; *Clodfelter v. Cox*, 1 Sneed, 330; *McLin v. Wheeler*, 5 Sneed, 687. In the case of *Wadlington v. Covert*, 51 Miss. 631, this court, referring to a similar order, said that if it had been accepted it would have been an equitable assignment *pro tanto* of the fund.

*A. H. Whitfield*, for the defendant in error.

The verdict on the plea in abatement is conclusive of the fact that Duke fraudulently disposed of his property. It establishes Duke's fraud; and, as this was a mere security, Menken Brothers cannot escape on the ground of their own innocence. *Davidson v. Moss*, 5 How. 673; *Swisher v. Fitch*, 1 S. & M. 541; *Farmers' Bank v. Douglass*, 11 S. & M. 469; *Johnston v. Dick*, 27 Miss. 277; *Hunt v. Knox*, 34 Miss. 655; *Stanton v. Green*, 34 Miss. 576; *Thomason v. Neeley*, 50 Miss. 310; *Hutchins v. Sprague*, 4 N. H. 469. But there has been no settlement between Duke and Combs, and for that reason Menken Brothers are not entitled to these assets. Laying the verdict in attachment out of view, the cases of *Van Vacter v. Flack*, 1 S. & M. 393; *Wadlington v. Covert*, 51 Miss. 631; and *Shackelford v. Hooker*, 54 Miss. 716, are conclusive against Menken Brothers.

GEORGE, C. J., delivered the opinion of the court.

The defendant in error sued out an attachment against F. M. Duke, upon the ground that he had assigned, or was about to assign, his property with intent to defraud his creditors, or give an unfair preference to some of them, and summoned J. L. Combs as garnishee. On the trial of the plea in abatement, the attachment was sustained. Combs, who was the assignee in the transaction upon which the attachment was sued out and sustained, answered that he had certain choses in action in his hands which belonged to Duke, but suggested that, by virtue of an order given to him by Duke in favor of Menken

Brothers, a firm composed of Julius Menken and another, fourteen hundred dollars of the amount had been assigned to said Menken Brothers, and asked that they be summoned to propound their claim. Menken Brothers appeared, and made their claim, which was based on the following paper, given three days after the assignment to Combs :

“Dr. J. L. Combs :

May 18, 1877.

Pay to Menken Brothers or order fourteen hundred dollars out of any balance due me upon settlement, the amount paid on this order to be a credit on my account with Menken Brothers.

F. M. DUKE.”

The order was accepted by Combs on the same day in the following words : “Accepted with the following condition, if any thing is due F. M. Duke on settlement Jan. 1, 1878, or thereafter.

J. L. COMBS.”

It was shown, in opposition to the claim of Menken Brothers, that the attachment was sustained on the ground that the assignment of the choses in action in the hands of the garnishee, and other property, was fraudulent ; that Combs had paid back to Duke three thousand dollars out of the assigned assets ; and that no settlement had been made between Combs and Duke. There was no other proof of fraud in the assignment to Combs than as above stated. The adjudication in the attachment suit that the assignment was fraudulent, was *res inter alios acta*, so far as Menken Brothers were concerned, as they were no parties to it. So far, therefore, as their rights are to be affected, that assignment is to be treated as fair and *bona fide*, if there is nothing but the adjudication to condemn it. The giving of the order upon Combs, and its acceptance by him, were an assignment to them of so much of the funds or assets in his hands as was necessary to pay it. *Mandeville v. Welch*, 5 Wheat. 277 ; *Spofford v. Kirk*, 97 U. S. 484 ; *Wadlington v. Covert*, 51 Miss. 631. The fact that no settlement had been made between Combs and Duke did not lessen the rights of Menken Brothers. The stipulation in the acceptance, and in the order on that subject, was merely

for the benefit of Combs, and was not intended as a condition precedent to the vesting of the rights of the payees in the order. If Combs failed to make the settlement, he could not plead his own negligence to defeat the rights of others; nor can the plaintiff in attachment make such plea. The judgment of the court below is reversed, and as the cause was submitted to the judge of the Circuit Court on the law and the facts, upon an agreed statement of the facts, we direct judgment to be entered here for the claimants, who will be entitled to satisfaction prior to the plaintiff in attachment.

*Judgment accordingly.*

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C. H. WILLIAMS v. PLANTERS' INSURANCE COMPANY ET AL.

1. MALICIOUS PROSECUTION. *Trespass on the case. Corporation.*

A corporation is, like a natural person, liable to an action of trespass on the case for a malicious prosecution conducted by its officers and agents.

2. SAME. *Misjoinder of counts. False imprisonment.*

That some counts in the declaration aver imprisonment in consequence of the prosecution, neither converts the action into trespass nor constitutes misjoinder.

ERROR to the Circuit Court of Lauderdale County.

Hon. J. S. HAMM, Judge, having been of counsel, J. C. ROBERTS acted as judge, *pro hac vice*.

The plaintiff in error filed against the Planters' Insurance Company and two other insurance companies a declaration containing the four following counts: (1) that the defendants, intending to injure and oppress the plaintiff and have him imprisoned, did without probable cause, on Feb. 12, 1876, procure to be issued by a Chancellor and Conservator of the Peace, a warrant for his apprehension upon a charge of the capital crime of arson in procuring a hotel to be burned, that he was wrongfully and unjustly arrested and placed in the common jail of the county, where he remained without bail until discharged upon a writ of *habeas corpus* sued out before a Circuit Judge, and

that the defendants well knowing the charge to be false, wholly abandoned it and have not further prosecuted; (2) the same as the first, except that it alleged that the plaintiff lay in the common jail two days, and suffered greatly in body and mind, that he expended a large sum in procuring his discharge and proving his innocence, and that he was prevented from following his lawful business for two years, and injured in his credit and circumstances; (3) that the defendants on May 19, 1876, falsely, maliciously and without probable cause, indicted and caused to be indicted the plaintiff, in the Circuit Court of Lauderdale County, for the crime of arson in setting fire to and burning the hotel in the night-time, and that the defendants, without any probable cause, prosecuted and caused to be prosecuted the indictment against him in said court, but that he has been fully acquitted of the accusation and discharged therefrom as will fully appear by the records of the court, that he expended money in defence, and has been driven from business, ostracised in society, and otherwise injured; (4) the same as the third, except it charges that the defendants, without probable cause, indicted and procured to be indicted the plaintiff for the crime of arson in burning the hotel with intent to injure the insurance companies which had insurance thereon. The damages are laid in this count, as in the others, at \$20,000. The defendants' demurrer, which was sustained, stated as grounds, the misjoinder of two causes of action,—malicious prosecution, and false imprisonment; and that the defendants, being artificial persons, could not make an affidavit, sue out a warrant, or act maliciously.

*W. H. Hardy*, for the plaintiff in error.

1. There is no misjoinder of separate and distinct causes of action, but a joinder of several counts in one form of action, to-wit: An action of trespass on the case for malicious prosecution. Neither count is for false imprisonment. The allegation in the first and second counts, that the plaintiff was imprisoned in the county jail, is stated only as a fact by way of aggravation of damages. It is true that there are four counts in the declaration, each setting up a separate cause of action, but this practice is as old as the common law itself. Indeed, good pleading requires it. When the plaintiff has two causes

of action, which may be joined in one action, he ought to bring one action only; and if he commences two actions, he may be compelled to consolidate them, and to pay the costs of the application. 11 Chitty Pl. 199, 200, notes; *Ingraham v. Hall*, 11 Serg. & R. 78. The counts are for the separate and distinct torts committed by the defendants against the plaintiff, all of the same nature, all of the same form of action, all admitting of the same plea and the same judgment, and coming strictly within the rule.

2. An action for malicious prosecution will lie against a corporation. Coke and Blackstone say that a corporation being ideal and intangible cannot maintain nor be made defendant to an action for personal injuries, "for it can neither beat nor be beaten in its body politic." It cannot "be committed to prison, for no man can apprehend or arrest it." It cannot be outlawed. "Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture or corruption of blood. It cannot be executor or administrator, or perform any personal duties; for it cannot take the oath of office." For the same reason, we may add, it cannot be President of the United States. "Neither," says Blackstone, "can a corporation be excommunicated; for it has no soul." 1 Black. Com. 477. That idea of a corporation is followed in the two cases chiefly relied on for the defendant in error: *Owsley v. Montgomery Railroad Co.*, 37 Ala. 560; and *Gillett v. Missouri Valley Railroad Co.*, 55 Mo. 315. The error in the counsels' position is in assuming, like some of the authorities which they cite, that evil intention in the corporation must be shown to maintain the action. This is not true. *Johnstone v. Sutton*, 1 T. R. 510; 2 Greenl. Evid. § 453; *Commonwealth v. Snelling*, 15 Pick. 321; *Vance v. Erie Railway Co.*, 3 Vroom, 334. Other cases cited by them hold that the company is not liable, because the prosecution is *ultra vires*. If that were true, every one would become incorporated, and plead *ultra vires* to suits for their torts. The venerable absurdity on which those views are based has, however, been superseded by an enlightened modern doctrine. A corporation is liable for an injury done by one

of its servants, in the same manner, and to the same extent only, as a natural person would be liable under like circumstances. Angell and Ames on Corp. §§ 386, 387. It may be sued and is liable in damages for breaches of its contracts or covenants and for its torts. 1 Field on Corp. 850. It is liable for the torts of its agents while acting within the general scope of their authority. *Philadelphia Railroad Co. v. Derby*, 14 How. 468; *Noyes v. Rutland Railroad Co.*, 27 Vt. 110; *Alabama Railroad Co. v. Kidd*, 29 Ala. 221; *Yarborough v. Bank of England*, 16 East, 6; *Bloodgood v. Mohawk & Hudson Railroad Co.*, 18 Wend. 9; *Dater v. Troy Turnpike Co.*, 2 Hill, 629; *Hale v. Union Mutual Fire Ins. Co.*, 32 N. H. 295; Redf. on Railways, 513; *Lowell v. Boston & Lowell Railroad Co.*, 23 Pick. 24. The reason of the rule is very clearly stated in Cooley on Torts, 122. The principle has been recognized in this State, as well as by the Supreme Court of the United States, and in England. *New Orleans Railroad Co. v. Bailey*, 40 Miss. 395; *Philadelphia Railroad Co. v. Quigley*, 21 How. 202; *Whitfield v. South Eastern Railway*, 96 Eng. Com. Law, 115. The application to a case like the one at bar is made in *Carter v. Howe Machine Co.*, 7 Law Reporter, 621; *Vance v. Erie Railway Co.*, 8 Vroom, 384; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23; *Maynard v. Fireman's Ins. Co.*, 34 Cal. 48; *Goodspeed v. East Haddam Bank*, 22 Conn. 530.

*John W. Fewell*, on the same side.

*Nugent & McWillie* for the defendants in error.

1. There is a misjoinder of counts in the declaration. The first is for false imprisonment, — imprisonment in which malice is not charged as an ingredient in the offence at all. The action is trespass on the case; but an action of trespass is the proper remedy for a false imprisonment. *Stanton v. Seymour*, 5 McLean, 267; 2 Selwyn N. P. 915; *Crowell v. Gleason*, 1 Fairf. 325; 2 Chitty Pl. 847, 857. The third count is for malicious prosecution, in which the form of action is trespass on the case. 2 Selwyn N. P. 1061, *et seq.*; 2 Chitty Pl. 596, 600. Malice is the leading constituent in the offence, and must be averred in the declaration. 2 Chitty Pl. 600; 2 Selwyn N. P. 1062. This malice may be express



or implied, but to sustain any action of the kind there must be (1) Malice of the defendant express or implied; (2) Want of probable cause; and (3) Injury sustained by the plaintiff by reason of the malicious prosecution. 2 Selwyn N. P. 1065, *et seq.* The declaration must, therefore, allege that the prosecution was malicious and without probable cause, and these facts must be shown on the trial, to warrant a recovery. *Wiggin v. Coffin*, 3 Story, 1; *Cook v. Walker*, 30 Ga. 519; *Jacks v. Stimpson*, 18 Ill. 701; *Cummings v. Parks*, 2 Ind. 148; *Olive v. Daugherty*, 2 G. Greene, 398; *Malone v. Murphy*, 2 Kansas, 250; *McLean v. Cumberland Bank*, 24 Maine, 566; *Stone v. Crocker*, 24 Pick. 81; *Greenwade v. Mills*, 31 Miss. 464; *Moore v. Sauborin*, 42 Mo. 490; *Besson v. Southard*, 10 N. Y. 236; *McNeese v. Herring*, 8 Texas, 151; *Campbell v. Threlkeld*, 2 Dana, 425; *Turner v. Walker*, 3 Gill. & J. 377; *Pangburn v. Bull*, 1 Wend. 345; *M' Cormick v. Sisson*, 7 Cowen, 715; *O'Driscoll v. M' Birney*, 2 Nott & McCord. 54; *Stone v. Stevens*, 12 Conn. 219; *Young v. Gregorie*, 3 Call, 386; *Persons v. Hight*, 4 Ga. 474; *Hunter v. Wilkinson*, 44 Miss. 721; *Welch v. Jamison*, 1 How. 160; *Ragsdale v. Bowles*, 16 Ala. 62. The case of *Greenwade v. Mills*, 31 Miss. 464, determines that malice is the gist of this action.

2. A corporation cannot be sued for a malicious criminal prosecution. It is incapable of malice in criminal prosecutions. *Owsley v. Montgomery Railroad Co.*, 37 Ala. 560; *Gillett v. Missouri Valley Railroad Co.*, 55 Mo. 315. In the latter case the court clearly illustrate the difference between those cases in which an action would lie against the corporation for the malice of its agents, and when not. They review all the cases in favor of the right to maintain the action; explain *Goodspeed v. East Haddam Bank*, 22 Conn. 530, as being founded on a statute of the State, and the prosecution a civil suit by attachment, and conclude that the action brought in that case came within the powers of the corporation to sue for injuries to its property, and if that power was abused and perverted to malicious purposes, it was properly held that the corporation should be held liable for whatever damages might result. As thus explained the case of *Goodspeed v. East Haddam Bank*,

*ubi supra*, is not in point. In *Vane v. Erie Railway Co.*, 3 Vroom, 334, it does not appear whether the prosecution complained of was criminal or civil, and in *Childs v. Bank of Missouri*, 17 Mo. 213, the court denied the liability.

CAMPBELL, J., delivered the opinion of the court.

The objection to the declaration for misjoinder is not well taken. We have compared the declaration with approved precedents of declarations in case for malicious prosecution, and it conforms to them. The averment of the imprisonment of the plaintiff, in consequence of the malicious prosecution, did not convert the action into trespass for false imprisonment, even under the absurd refinements of the common law pleaders in their subtle distinctions between trespass *vi et armis* and case.

The real question of substance presented by the demurrer is, whether a corporation aggregate is liable to an action for malicious prosecution. The old doctrine was that a corporation was not so liable, because malice is the gist of the action, and it was said, that malice could not be imputed to a mere legal entity, which having no mind could have no motive, and, therefore, no malice, and this narrow view still prevails to some extent. But the steady process of judicial evolution has led to the establishment, in some of the courts, of the just doctrine of the civil responsibility of a corporation for the acts of the sentient persons who represent it, and through whom it acts, and of the liability of a corporation for the acts of its agents, under the conditions that attach to individuals. *Philadelphia Railroad Co. v. Quigley*, 21 How. 202; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Vance v. Erie Railway Co.*, 3 Vroom, 334; *Copley v. Grover & Baker Sewing Machine Co.*, 2 Woods, 494; *New Orleans Railroad Co. v. Bailey*, 40 Miss. 395. We approve this doctrine, and hold that a corporation may be held liable for a malicious prosecution conducted by its officers and agents, just as if the corporation was a natural person.

*Judgment reversed, demurrer overruled and cause remanded.*

## S. B. MOORE v. W. F. LOVE.

1. SALE. *Statute of Frauds. Essentials.*

A verbal sale, without a memorandum, of more than fifty dollars worth of cotton, is invalid, under the Statute of Frauds, against a subsequent attachment, unless part of the price is paid or part of the cotton delivered.

2. SAME. *Delivery of samples. Part of bulk.*

Delivery of samples is a compliance with the statute, only when they are treated by both parties as part of the goods sold, and as diminishing the quantity or weight thereof to the extent of their bulk.

3. SAME. *Mere specimens. Question of fact. Burden of proof.*

Whether the samples are so regarded is a question of fact, and the burden of establishing the affirmative rests upon the party who asserts it, and, if they are treated as specimens only, their delivery does not satisfy the statute.

ERROR to the Circuit Court of Amite County.

Hon. J. B. CHRISMAN, Judge.

An attachment was, at suit of the plaintiff in error, levied on two bales of cotton as the property of T. J. Everett, the defendant in the writ. The defendant in error claimed the two bales upon the ground that he had received them from Everett to sell and pay himself a debt with part of the proceeds, and had sold them, with six bales of his own cotton, to W. B. Raiford, who left them with the claimant to ship, and that after the levy the claimant paid Everett the value of the cotton, deducting the debt. The verdict and judgment were for the claimant.

*W. P. & J. B. Harris*, for the plaintiff in error.

The sale was incomplete. It was verbal, and there was neither delivery nor payment of the price. Hilliard on Sales, 120, 190; Benjamin on Sales, 480. There is no proof that the samples were taken as part delivery. Hilliard on Sales, 156. Nothing in the transaction gives it the character of a completed sale. *Stamps v. Bush*, 7 How. 255. It devolved on the claimant, who asserted the fact, to prove that the samples were treated as part of the bulk.

*B. F. Johns*, for the defendant in error.

Delivery of the samples and agreement upon the price, the weights being fixed, completed the sale. Nothing more was to be done by either party. Raiford had the right to control the cotton, which he exercised by directing Love to carry it to Summit, and ship it to New Orleans. *Jordan v. Harris*, 31 Miss. 257; *McKay v. Hamblin*, 40 Miss. 472. Owing to the nature of the property, no other delivery was possible. *Ingersoll v. Kendall*, 18 S. & M. 611. Under Code 1871, § 861, the burden of proof was upon the plaintiff in attachment.

CHALMERS, J., delivered the opinion of the court.

The most favorable light in which the claim of the defendant in error can be viewed is to consider him as invested with the rights of Raiford, and entitled to hold the cotton by virtue of the latter's purchase, which preceded the levy of the attachment. Did Raiford acquire title? He thus states the facts connected with his alleged purchase: "W. F. Love presented samples and weights of eight bales of cotton on Dec. 12th, 1878, and I agreed to give him a certain price for said cotton, and he was to take it to the railroad at Summit and ship the same to New Orleans. I never saw the cotton. I would have paid Love for the same had he demanded it, or what money I had on hand. Love was to wait a few days for the money." Such is his statement of what passed. The cotton was at the time some miles distant, had never been seen by Raiford, and was levied on in a few hours after the above negotiations, and before any thing had been done to perfect them.

These facts do not meet the requirements of a valid sale under the Statute of Frauds. The cotton was worth more than fifty dollars. No part of the purchase-money was paid, no memorandum in writing was made, and no portion of the goods were delivered, unless the samples were. The delivery and receipt of samples, conceding that they took place, can only be held a compliance with the Statute of Frauds when they are considered and treated by both parties as constituting a part of the goods sold, and as diminishing the quantity or weight of such goods to the extent of their own bulk.

Whether they are so received and regarded is a question of fact, the burden of establishing which devolves upon him who asserts it. Where they are treated by the parties as specimens only of the goods sold, a delivery of them to the buyer does not satisfy the requirements of the Statute of Frauds. Benjamin on Sales (2d Am. ed.), § 142, note c, and cases cited. Taking Raiford's own version of the transaction between Love and himself, nothing more is shown than an executory agreement to buy at a certain price, which failed of execution by the intervention of the attachment. Love, of course, can prefer no claim to the cotton growing out of his own payment to Everett after the levy of the attachment.

*Judgment reversed and new trial awarded.*



EUGENE WOLFE v. HALLIE ANGEVINE ET AL.

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UNLAWFUL DETAINER. *Privity.*

Owners of the reversion cannot, after the death of the tenant by the curtesy, maintain unlawful detainer against his lessee.

ERROR to the Circuit Court of Grenada County.

Hon. SAM POWEL, Judge.

After the mother of the defendants in error died seised of the lot in controversy, her husband, their father, leased it to the plaintiff in error, and after the death of their father, before the expiration of the term, the defendants in error brought this unlawful detainer proceeding in 1879 to oust the tenant. In the Circuit Court, on appeal, they obtained a judgment for possession.

*G. Y. Freeman*, for the plaintiff in error.

The remedy of unlawful detainer, under the act of 1878, is inapplicable to this case. There was no privity between the plaintiffs and defendant. *Cummings v. Kilpatrick*, 23 Miss. 106; *Whitney v. Dart*, 117 Mass. 158; *Taylor's Landlord and Tenant*, § 64.

*C. L. Bates* and *W. C. McLean*, for the defendants in error.

The action was properly brought under the third section of the act of 1878 (Acts 1878, p. 172). Where the life-tenant demises the premises for a time longer than his term, his lessee is, in law, tenant to the reversioner, under whom he is considered as having entered. *Day v. Cochran*, 24 Miss. 261; *Griffin v. Sheffield*, 38 Miss. 359; *Moak v. Bryant*, 51 Miss. 560.

CAMPBELL, J., delivered the opinion of the court.

Unlawful detainer did not lie in the state of case disclosed by the record. There was no privity between the owners of the reversion and the lessee of the tenant by the curtesy. They acquired their inheritance by descent from their mother, and nothing, as to it, from their father. His death caused an accrual of their right to immediate enjoyment of their inheritance, which had been interrupted by his life-estate as tenant by the curtesy, but all their rights were derived by descent from their mother. It is true that it was announced in *Day v. Cochran*, 24 Miss. 261, and *Griffin v. Sheffield*, 38 Miss. 359, that the vendee of an estate by the curtesy, continuing to hold possession after its termination by the death of the tenant by the curtesy, is a tenant at sufferance of the holder of the legal title, so as not to be entitled to invoke the Statute of Limitations, and not to be allowed to acquire an outstanding title without first surrendering possession; but the extent of the principle on which these cases rest is that, the party being in by a lawful title, the law, which presumes no wrong, will suppose him to continue by right, and that his possession is permissive. It still remains true that a tenant at sufferance stands in no privity to the landlord, and that unlawful detainer does not apply to such a case as is here presented. *Cummings v. Kilpatrick*, 28 Miss. 106.

*Judgment reversed and cause remanded.*

## C. L. HOLDEN v. G. M. DAVIS.

**SET-OFF. Payment by mistake. Bill of exchange.**

The drawee of two drafts of the same date, amount, maturity, and parties, who accepts one, and afterwards pays the other by mistake, cannot set off such payment in a suit upon his acceptance, where the payment of the unaccepted draft caused a failure to protest it.

**ERROR to the Circuit Court of Adams County.**

Hon. RALPH NORTH, Judge, did not sit in this case, but Hon. J. B. CHRISMAN, presided by interchange.

*T. O. Baker* and *R. E. Conner*, for the plaintiff in error.

Money paid under a mistake of fact can be recovered back, although no fraud was practised by the other party. *Esp. N. P.*, 1, 2; *Bank of Louisiana v. Ballard*, 7 How. 371; *Union Bank v. United States Bank*, 3 Mass. 74; *Pearson v. Lord*, 6 Mass. 81; *Garland v. Salem Bank*, 9 Mass. 408; *Lazell v. Miller*, 15 Mass. 207; *Mowatt v. Wright*, 1 Wend. 855; *Burr v. Veeder*, 3 Wend. 412; *Tinslar v. May*, 8 Wend. 561. The right to recover is not affected by the mere fact that the party so paying did not avail himself of the means of knowledge in his power. *Rutherford v. McIvor*, 21 Ala. 750; *Milnes v. Duncan*, 6 B. & C. 671; *Kelly v. Solari*, 9 M. & W. 54; *Bell v. Gardiner*, 4 M. & Gr. 11; *Townsend v. Crowdy*, 8 C. B. N. s. 477. Money, which may be recovered back in a separate action, may be pleaded as a set-off. *Whitehead v. Cade*, 1 How. 95; *Kershaw v. Merchants' Bank*, 7 How. 886, 893; *Richards v. Blood*, 17 Mass. 66.

*Frank Johnston*, on the same side.

The only question is whether, the drawee having at the time the means of finding out the facts, failing to make inquiry or investigation will prevent a recovery. In *Waite v. Leggett*, 8 Cowen, 195, 197, it was held that actual knowledge of the true facts, at the time when the payment is made, is what is meant, and not simply the means of knowledge. *Rutherford v. McIvor*, 21 Ala. 750, is a case precisely in point. This particular question is decided in *Kelly v. Solari*, 9 M. & W. 54. In *Cooper v. Langdon*, 9 M. & W. 60, it was said that, if the party

honestly acted under a mistake, it did not matter if he was careless. It is generally held that failure to inquire will not prevent the recovery of money paid under a mistake.

*A. H. Handy*, for the defendant in error.

The rules contended for on behalf of the plaintiff in error have no application to the merits of the case, on the assumption that the money was paid by mistake of fact. There was no pretence of fraud or undue advantage in receiving the money; and no pretence that Davis was not entitled to receive it on the draft that was paid to him, and taken up by Holden, so as to deprive him of remedy against the drawer. It is, therefore, unnecessary to discuss the rules under which a party paying money by mistake to another, not entitled to it, may recover it back in an action *ex æquo et bono* as wrongfully paid, for such a case is clearly not presented by this record.

CHALMERS, J., delivered the opinion of the court.

Sandy Turner drew two drafts in favor of G. M. Davis on C. L. Holden, of the same date, amount and maturity, one of which was, and the other was not, accepted by Holden. Neither was intended as a duplicate of the other, but together they represented the amount intended to be paid by the drawer to the payee. On the day of maturity the unaccepted one was presented to Holden, and by him paid, under the mistaken belief, through carelessness and inattention, that it was the accepted one which he was paying. It is agreed that no fraud was practised or intended by the payee, who must be held therefore to have presented the unaccepted draft with the *bona fide* purpose of seeing whether the drawee would not pay it despite the lack of previous acceptance. It is not shown whether it had been previously presented for acceptance or not. Suit is now brought on the draft which was accepted, and the acceptor pleads, by way of set-off, the amount paid by mistake upon the draft upon which he was not liable.

There can be no doubt of the right to plead, as a set-off, any demand for which a suit can be sustained under the common counts, for money had and received or for money paid out and expended; and it is equally well settled that money paid under a mistake of fact, where the



party receiving it was not entitled to it, may be recovered even though the mistake originated in carelessness or forgetfulness, and the party making the payment had the means of information at hand. *Kelly v. Solari*, 9 M. & W. 54; *Waite v. Leggett*, 8 Cowen, 195; *Rutherford v. McIvor*, 21 Ala. 750. We think, nevertheless, that the court below rightly ruled that the facts pleaded constituted no defence. While it is true that money paid by mistake by one who is not liable for it may be recovered back, the principle will not apply where, in a case free from fraud, it is paid to one who is entitled to receive it from a third person, and who loses the right to pursue such third person by reason of the mistaken payment. The payee in this case lost the right to hold the drawer of the unaccepted draft liable by reason of his failure to protest it, and the failure to protest was caused by the payment made by Holden. This payment it is shown took place on the last day of grace, and it was several days afterwards before Holden discovered his mistake and notified the payee of it. The drawer was consequently released, and, as this result was caused by Holden's mistake, the loss must fall upon him.

*Judgment affirmed.*



C. A. KENNEDAY ET AL v. HULDRICK PRICE ET AL.

1. MARRIED WOMAN. *Certificate of acknowledgment.*

A certificate of acknowledgment by a married woman, which shows a separate examination, is not insufficient because it fails to show a separate acknowledgment.

2. SAME. *Duress. Conclusiveness of certificate.*

The officer's certificate is conclusive that the wife's acknowledgment was voluntary, in favor of grantees without notice of any undue influence.

3. SAME. *Resulting trust. Labor of her slaves.*

A trust in land purchased by the husband does not result in the wife's favor, under Code 1871, § 1779, from the fact that her slaves cut on his land the wood which paid for it.

4. SAME. *Estoppel.*

The wife is estopped to assert such trust against grantees without notice to whom she and her husband have conveyed his legal title.

ERROR to the Chancery Court of Lafayette County.

Hon. A. B. FLY, Chancellor.

*J. M. Phipps*, for the plaintiffs in error.

The property was Mrs. Kenneday's separate estate, paid for with her means, although the deed was taken to her husband, who therefore held as trustee for her. *Butterfield v. Stanton*, 44 Miss. 15. The defendants had notice of Mrs. Kenneday's claim, and by fraud and duress her husband and their attorney induced her to join in his deed to the defendants. The certificate of acknowledgment is fatally defective in failing to show the separate acknowledgment.

*Nugent & McWillie*, on the same side.

It makes no difference that the lots were purchased with wood instead of money. *Clark v. Clark*, 43 Vt. 685; *Blauvelt v. Ackerman*, 5 C. E. Green, 141; *Peabody v. Tarbell*, 2 Cush. 226; 1 Lead. Cas. Eq. 340, 341; *Methodist Church v. Jaques*, 1 Johns. Ch. 450; *Dickinson v. Codwise*, 1 Sandf. Ch. 214; *Pinney v. Fellows*, 15 Vt. 525; *Lathrop v. Gilbert*, 2 Stock. Ch. 344. The attorney and her husband, blending their influence, coerced Mrs. Kenneday into making the acknowledgment, and it is void. *Taylor v. Wilburn*, 20 Mo. 306; *Davis v. Calvert*, 5 Gill & J. 269. There is no doubt that when undue influence appears to have been exercised between husband and wife, a remedy may be had in equity. *Fry v. Fry*, 7 Paige, 461; *Delafield v. Parish*, 25 N. Y. 9, 96; *Williams v. Baker*, 71 Penn. St. 476; *White v. Graves*, 107 Mass. 325; *Chesterfield v. Janssen*, 2 Ves. Sr. 125; *Conant v. Jackson*, 16 Vt. 335, 350; *Brogden v. Walker*, 2 Harr. & J. 285; *Kennedy v. Kennedy*, 2 Ala. 571; *Freelove v. Cole*, 41 Barb. 318; *Buffalow v. Buffalow*, 2 Dev. & Bat. Eq. 241; *Austin v. Winston*, 1 Hen. & Munf. 33; *Whelan v. Whelan*, 3 Cowen, 537; *Long v. Mulford*, 17 Ohio St. 484, 505. She is not estopped to make this claim because no injury has been done any innocent party.

*H. A. Barr*, for the defendants in error.

Mrs. Kenneday's claim was that of a homestead exemption which is manifestly untenable. The resulting trust is an afterthought, and the evidence to establish it is not clear or credible. *Johnson v. Quarles*, 46 Mo. 423. The amount is not shown

with certainty. 1 Lead. Cas. Eq. 336, 339; *Baker v. Vining*, 80 Maine, 121. The defendants in error are *bona fide* purchasers without notice. 2 Lead. Cas. Eq. 32, 33, and cases cited; *Love v. Taylor*, 26 Miss. 567; *Price v. Martin*, 46 Miss. 489; *McDuff v. Beauchamp*, 50 Miss. 531; *O'Hara v. Alexander*, 56 Miss. 316. The certificate of acknowledgment is sufficient. *Bernard v. Elder*, 50 Miss. 336. The officer is presumed to have done his duty. *Johnston v. Wallace*, 53 Miss. 331. Mrs. Kenneday has failed to prove the duress.

*W. P. Harris*, on the same side.

The complainants' case is grounded on the idea of duress, which is not made out by the evidence, and it must therefore fail. Neither of the defendants in error knew of Mrs. Kenneday's claim. The statute has provided a means of averting the influence of the husband by a judicial examination of the wife. That examination was made, the certificate was in proper form, and no proof can be admitted against it. *Allen v. Lenoir*, 53 Miss. 321.

CHALMERS, J., delivered the opinion of the court.

Mrs. Kenneday, having executed jointly with her husband a conveyance of the family homestead, brings this bill to vacate and annul it. She rests her claim to relief upon three grounds: 1st. That her acknowledgment was defective and insufficient to convey the title. 2d. That she was coerced into making the deed by her husband and by the attorney of the grantees. 3d. That the homestead, though the record title was in her husband, had been bought with her means, that she was entitled to a resulting trust in it, and that she had been induced to convey it in consequence of having been misled and deceived as to her legal rights by her husband and the attorney of the grantees. The certificate of acknowledgment, after reciting the appearance of the wife, thus proceeds, "who after a private examination, separate and apart from her said husband, acknowledges that she signed, sealed and delivered the foregoing deed as her voluntary act, freely and for the purposes therein expressed, without any fear, threat or compulsion of her said husband." The objection made is that, while it states that the wife *was examined* separately, it does not show

that she *acknowledged* separately. The objection is hypercritical. A substantial, and not a literal, compliance with the requirements of the statute is all that is necessary. A certificate practically similar to this was sustained in *Bernard v. Elder*, 50 Miss. 336.

There is no proof of anything that amounts to coercion on the part of the husband or of the attorney of the grantees. The husband is shown to have desired his wife to sign, and to have urged her to do so, but certainly nothing like duress or intimidation is shown. Apart from this, the certificate of the officer is conclusive of the voluntary nature of the wife's act, it not being established that the grantees or their attorney had notice of any undue influence exercised by the husband. *Johnston v. Wallace*, 53 Miss. 331.

The claim of a resulting trust rests upon the alleged fact that the land was bought for the wife and paid for by wood cut upon the husband's land by the wife's slaves and hauled by the husband's wagons and teams. The claim is that, because the labor was done by the wife's slaves she is entitled, under Code 1871, § 1779, to set up a resulting trust in the property. The claim is wholly inadmissible. The statute declares that, "if the husband shall purchase property in his own name, with *the money* of the wife, he shall hold the same only as trustee, for her use," and while we will not say that the investment of her property other than money would not have the same effect, we certainly cannot hold that, because the services of her slaves have been utilized in delivering and making more valuable personal property belonging to the husband, he thereby becomes a trustee for her of the realty thereby acquired. Such a principle would clothe her with an equitable title to land purchased by the sale of a crop grown by the husband on his own land, if her slaves or live-stock participated in its production. It is shown, moreover, by the proof that the grantees in the conveyance were ignorant of her claim, and therefore by the express letter of the statute she is estopped to assert it against them. There is no sufficient proof of any fraud practised upon her in the matter.

*Decree affirmed.*

MILDRED W. TURNER, ADMINISTRATRIX, ET AL. v. W. V. TURNER ET AL.

57	775
70	350
57	775
81	362
81	363

1. WILL. *Charge of legacies on land. Blending of property.*

Under a will giving the testator's real estate, slaves and personal property to a person who is named as executor, on condition that, at the expiration of five years, he will pay, or cause to be paid, certain sums of money, the legacies are a charge on all the property alike.

2. SAME. *Land sold under power. Freed from charge.*

Land sold by the devisee and executor in pursuance of a power conferred on him by the will to sell, "in order to obtain money to pay the above legacies, or for any other purposes that he may think advantageous to himself," is not subject in the hands of his vendees to a charge for the legacies.

3. SAME. *Suit for legacy. Chancery jurisdiction.*

The Chancery Court, in which the will is admitted to probate, has jurisdiction of a suit by the legatees for sale of the land and payment of the legacies, by virtue of Code 1871, § 977, although, owing to a subsequent establishment of another chancery district in the county, the land lies and the parties live in the latter district.

APPEAL from the Chancery Court of Yalobusha County.

Hon. A. B. FLY, Chancellor.

The appellees, legatees under Ransom Turner's will, filed this bill in the Chancery Court in which it was probated against the appellants, the vendees of William H. Turner, and his widow, who is the sole devisee under his will and administratrix of his estate with the will annexed, to charge the land of Ransom Turner with the payment of the complainants' legacies, and sell it. The answers admitted the will, but claimed that the land was not charged with the legacies, that, by sale, William H. Turner freed it from any charge to which it was subject, and that the court had no jurisdiction, because, since the probate of the will, the county had been divided into two chancery districts, and the lands lie and the parties to this suit reside in the newly made district. So much of Ransom Turner's will as bears upon the questions is as follows: "After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows,

viz.: To my brother, William H. Turner, all the real estate, with the appurtenances thereunto belonging, now belonging to me or in my possession, viz.: [here follows a description of the land devised by metes, bounds and numbers]. I further give and bequeath to the said William H. Turner all of my negro property, consisting of nine slaves, viz.: [here follow the names of the slaves], and to said William H. Turner I give all my personal property of every other description, to have, hold and enjoy the same, with all the profits and interest arising or accruing therefrom, upon condition that the said William H. Turner, at the expiration of five years, will pay, or cause to be paid, the following sums of money to the devisees herein named [here follow the pecuniary legacies to the complainants]. I do hereby ordain that the said William H. Turner may, and it is my wish that, in order to obtain money to pay the above legacies, or for any other purposes that he may think advantageous to himself, he sell or dispose of any part or parcel of the real estate herein bequeathed without any order of court for that purpose." The slaves and most of the personal property being lost by the war, the Chancellor decreed the sale of all the land to pay the legacies.

*FitzGerald & Whitfield*, for the appellants.

The land under this will is not charged with the legacies. *Adams v. Brackett*, 5 Met. 280; *Lupton v. Lupton*, 2 Johns. Ch. 614; 1 Roper on Legacies, 682; 2 Redfield on Wills, 208, 212. At all events, the personal property which remained, and which was sufficient to pay the legacies, should have been first exhausted. Power to sell for any purpose which the executor deemed advantageous is inconsistent with the theory of a charge on the land to pay legacies. The devise was unconditional. Purchasers from the devisee take the land free of the charge. 1 Redfield on Wills, 279; 1 Roper on Legacies, 744, 745. As the executor had power to sell for any purpose he chose, his vendees were not bound to see the purchase-money applied to the legacies. 3 Redfield on Wills, 235.

*George H. Lester*, on the same side.

Notwithstanding Code 1871, § 977, no jurisdiction remained in the Chancery Court for the first district of the county, after the second was established. The two jurisdictions are as sep-

arate and exclusive as though the two districts were two counties. Acts 1873, p. 166. As well might it be said that this suit should have been brought in Hinds County, had it so happened that the will of Ransom Turner was probated there, whilst the lands devised and all the parties in interest were in Yalobusha County. But the lands were an absolute devise to William H. Turner, and can, in no event, be charged with, or subject to, the payment of the complainants' legacies. There is no ambiguity in the words, no room for construction. *Vannerson v. Culbertson*, 10 S. & M. 150; *Sorsby v. Vance*, 36 Miss. 564. The intention of the testator must govern, and to aid in determining what it is, the circumstances under which the will was made may be considered. *Haughton v. Brandon*, 40 Miss. 729. The court erred in subjecting the lands, sold by William H. Turner in his lifetime, to pay legacies; for, independently of his right to sell, as owner in fee of the land, he had a well-defined power conferred by the will, and purchasers from him must be protected.

*W. S. Chapman* and *W. M. Jackson*, for the appellees.

The suit was properly brought under Code 1871, § 977, in the court where the will was probated. The Chancellor's construction of the will is right. There is nothing in the fact that the devise of the real estate preceded that of the personal property. The power only means that the executor, William H. Turner, might sell the realty to pay the testator's debts or these legacies if he preferred it, and he believed it was advantageous to himself, and retain the personalty for his own uses and purposes — provided, however, enough property should be sold to pay the legacies. By this construction, and by none other, effect is given to all the language of the will.

*B. H. Tabor*, on the same side.

Code 1871, § 977, conferred jurisdiction. The land is charged by the will with the legacies, and it was the duty of the purchasers to see to the application of the purchase-money, the will being of record, and its contents notice to the world. The cases of *Clyde v. Simpson*, 4 Ohio St. 445, and *Nellons v. Truax*, 6 Ohio St. 97, are conclusive of the affirmative of these propositions. Some of the lands are now unsold in the hands of the devisee's widow.

CAMPBELL, J., delivered the opinion of the court.

The condition that William H. Turner, at the expiration of five years, should pay certain sums of money to persons named in the will, applied to the real estate devised to him as well as the personal property. All the gifts to him by the will were upon this condition. The manifest purpose of the testator was to give all of his property to his brother, William H. Turner, subject to the payment of his debts and of certain pecuniary legacies, after five years. There is such a blending of the real and personal estate, in the disposition made by the will, that no distinction can be drawn between the two classes of property, and the legacies are a charge alike on the real and personal property. The case of *Adams v. Brackett*, 5 Met. 280, is clearly distinguishable from this, by the fact that, by the will construed in it, the testator expressly indicated that his debts, funeral charges, and other necessary expenses should be paid from his personal estate. Here there is no distinction drawn between the real and personal estate. All of the testator's estate, real and personal, is given to one person. There is nothing to indicate the purpose of the testator to give the land absolutely and unconditionally, and the personalty conditionally. The condition applies to all the property. 2 Redfield on Wills, 209, and cases cited.

The land sold by the devisee and executor, in pursuance of the authority conferred by the will on him to sell, "in order to obtain money to pay the above legacies, or for any other purposes that he may think advantageous to himself," is not subject, in the hands of his vendees, to a charge for the legacies. His conveyance vested title free from any such charge. Unlimited power and discretion, as to the purpose of the sale, were given to the devisee and executor, and a purchaser from him acquired title free from all concern as to the legacies given by the will. *Elliot v. Merryman*, 1 Lead. Eq. Cas. 59, and notes. The jurisdiction of the court, in which the suit was brought, is expressly conferred by § 977 of the Code. For the error in the decree, in subjecting the land sold by William H. Turner to the payment of the legacies, it is

*Reversed and cause remanded.*



## JAMES T. FANT v. ROBERT MCGOWAN, GUARDIAN.

1. GUARDIAN. *Removal for defective bond. Default essential.*

An order that a guardian is removed if he fails to give a new bond in a specified time is void; he must have an opportunity to comply with the requirement before the order of removal is made.

2. SAME. *Sale of land. Title. Purchaser's rights.*

The title to land subsequently sold by such guardian, under decree of the court, is good, and the purchaser cannot avoid paying the price by pleading the order of removal.

APPEAL from the Chancery Court of Marshall County.

Hon. A. B. FLY, Chancellor.

The appellee, regularly appointed guardian of certain minors in 1871, filed a petition on Dec. 24, 1877, under which such proceedings were had, that, on April 1, 1878, in accordance with its prayer, land was sold under a decree of court, by the guardian, who had given the statutory bond for the application of the proceeds. The appellant, who purchased at the sale, and paid the first instalment of the purchase-money, in answer to the guardian's bill for specific performance of the contract, set up that on Aug. 10, 1877, upon the petitions of sureties on the guardian's bond, and due notice to him, an order was made "that Robert McGowan give a new bond as guardian within ten days from this date, and in default thereof that he be and is hereby removed from his trust as guardian as aforesaid." The new bond was not given until June 23, 1879, when it was accepted and approved by the court.

A. M. Clayton, for the appellant, argued orally and in writing.

The order of the court removing the guardian is erroneous, but not void. The court had full and complete jurisdiction. Const. art. 6, § 16; Code 1871, § 1212; Acts 1876, p. 190; *State v. Hull*, 53 Miss. 626. Its order cannot be impeached collaterally. *Wall v. Wall*, 28 Miss. 409; *Moore v. Ware*, 51 Miss. 206; *Voorhees v. Bank of United States*, 10 Peters, 449; *Tilton v. Cofield*, 93 U. S. 163; Freeman on Judgments, §§ 118, 135. The distinction is plain between the statutory jurisdiction of the former Probate Court to sell land, under which it was held

that the statute must be complied with, and the full jurisdiction granted by the present Constitution to the Chancery Court. *Root v. McFerrin*, 37 Miss. 17. But, if the old rule is applied, the jurisdictional facts, such as the sureties' petitions and notice to the guardian, appear in the record, and the order is not affected by any irregularity in form. *Bennett v. Couchman*, 48 Barb. 73. The act of 1876, p. 190, does not require time to make the new bond to be given the guardian, and to that extent repeals the Code. The time was, however, allowed. The order is final, subject to be defeated by giving the new bond. *Lewis v. Outton*, 3 B. Mon. 453. The fact that it is conditional does not render it void. *Commonwealth v. Pejepsut Proprietors*, 7 Mass. 399. Judgments in detinue, or with stay of execution, and decrees of foreclosure, are all conditional. *Anon.*, 1 Salk. 400. A distinction between conditions precedent and subsequent exists. A person claiming by virtue of the former must prove performance before his claim can be sustained. *Fultz v. House*, 6 S. & M. 404. Under the latter, the thing is absolute until defeated by the happening of the subsequent event. *Clarke v. McCreary*, 12 S. & M. 347; 4 Kent Com. 126; 8 Com. Dig., title Condition. The order of removal, whether right or wrong, is the judgment of a competent court, upon a case clearly within its jurisdiction, and fixes the rights of the parties. 2 Dan. Ch. Pr. 1192; *Brown v. Clarke*, 4 How. 4; *Cook v. Tullis*, 18 Wall. 332.

*Arthur Fant*, on the same side, made an oral argument.

*Featherston & Harris*, for the appellee.

It is argued that the order removing McGowan was valid, and all his subsequent acts void. Neither branch of the proposition is well taken. The order is self-contradictory to such an extent as to be meaningless. If construed as a removal *in presenti*, it is void, because the court had no such power. Code 1871, § 1212. As an order *nisi*, it is inoperative, because of the subsequent action of the court. A final order of removal could not be made until the guardian had opportunity to give the required bond. Until he made default, judgment based thereon could not be rendered. The order was provisional and conditional, a decree *nisi* and not a final one. Freeman on Judgments, §§ 10, 104, 251, 2 Dan. Ch. Pr. 1000; *Cook v. Bay*,

4 How. 485; *Hunter v. Carmichael*, 12 S. & M. 726; *Bankston v. Bankston*, 27 Miss. 692; *Cole v. Miller*, 32 Miss. 89; *Goff v. Robins*, 33 Miss. 153. A final order removing a guardian must be absolute and unconditional. The one in this case could serve no other purpose than to give him notice that he would be removed, unless he gave the new bond, and could not have the effect of a removal. *Gaines v. Dailey*, 1 J. J. Marsh. 478; *Wheeler v. Raymond*, 6 Cowen, 582; *Ex parte McLendon*, 38 Ala. 276. The wards of McGowan, whose property was sold, cannot recover it now, however defective the title may be, because the sale was in good faith, and the first instalment of the purchase-money was paid and received by the wards, or properly expended for their benefit by their guardian. Code 1871, § 2178; *Richardson v. Brooks*, 52 Miss. 118; *Morgan v. Hazlehurst Lodge*, 53 Miss. 665; *Summers v. Brady*, 56 Miss. 10.

*W. S. Featherston*, on the same side, argued orally.

CAMPBELL, J., delivered the opinion of the court.

The power to remove a guardian duly appointed is conferred by statute to be exercised in a prescribed mode, and it cannot be done except in pursuance of law. If the sureties upon a guardian's bond apprehend danger, and petition for the guardian to be required to give a new bond, and, after notice to the guardian, an order is made for him to give a new bond, "in case of refusal to comply, he shall be removed from office and another guardian appointed." Acts 1876, p. 190, § 40. An order requiring a new bond must be made; an opportunity must be afforded to comply; refusal to comply must be ascertained, and then the removal may be made; but an order of removal, made before default in the requirement to give a new bond, is without authority of law, and void. A judgment which the court has no authority by law to render is void. It matters not what is the grade of the court, if it transcends its lawful authority its act is void. Removal from the guardianship is a consequence of refusal to comply with the order to give a new bond. It is proper to make an order *nisi*, but unless this be followed by an absolute judgment of removal, the position of the guardian remains unaffected, and his acts as

guardian are valid. In this case it appears that, notwithstanding the order to give a new bond, which also removed the guardian in terms, by anticipation, he continued to act as guardian, and, as such, applied for and obtained an order to sell real estate. He was thus recognized as still guardian by the court which had made the order of removal. Whether this was in ignorance or forgetfulness of the order of removal or in disregard of it is not material. The order of removal, being without authority of law in the circumstances in which it was made, was a nullity, and the court did right to act in disregard of it. We are not unmindful of the presumption to be indulged in favor of the judgment of the Chancery Court, where it has jurisdiction of the subject-matter, and the person to be affected by a proceeding; but, as to the order removing the guardian, there is no room for presumption. The record shows the facts, and that the court made an order which it had no legal right to make at the time it was made. If the record showed that the guardian had been removed for refusal to comply with an order to give a new bond, made after due notice to him, the removal would be upheld. But the showing is that the power to remove was exerted, not for a refusal by the guardian to comply with the requirement to give a new bond, but because he might refuse so to do. It was not ascertained and determined that he had refused to comply, but he was removed by words *in præsentia*, if he should not thereafter within ten days comply. A judgment is the sentence of the law upon existing facts and not upon what may or may not thereafter occur. A guardian may be legally removed for an ascertained failure to comply with an order legally made, requiring him to give a new bond, but not because he may not in future comply with such an order. Failure to comply must be ascertained and declared before the exercise of the power of removal. Here there was no such ascertainment. There was no appointment of another guardian, but there was a subsequent recognition of McGowan as guardian, and an order of sale of real estate made on his application. We conclude that McGowan continued to be the guardian.

*Decree affirmed.*

## CRAWFORD HAYS v. THE STATE.

1. RAPE. *Indictment. Feloniously.*

Under Code 1871, § 2672, as at common law, an indictment for rape must charge that it was "feloniously" done, and the averment that the accused feloniously did make an assault, and her then and there forcibly and against her will ravish and carnally know, is insufficient.

2. SAME. *New trial. Practice on reversal.*

If the accused is convicted of rape on such an indictment, the Supreme Court will sustain a motion for a new trial and remand the case, in order that a trial for assault may be had upon the indictment as it stands, or a new indictment found for rape.

ERROR to the Circuit Court of Sumner County.

Hon. W. COTHRAN, Judge.

*F. S. White*, for the plaintiff in error, argued the case orally and filed a brief.

Under the indictment the accused could be convicted of nothing more than an assault. It charged a felonious assault, but not a felonious ravishment. "Feloniously did ravish" are technical words and are indispensable in every indictment for rape. No other words can supply their place. They are used in all the precedents, as well as the words "feloniously did assault." 1 Arch. Cr. Pl. & Pr. 999; Wharton Prec. Ind. & Pleas, 186; 1 Bish. Crim. Proc. § 559; 2 Bish. Crim. Proc. § 898, 907; *State v. Scott*, 72 N. C. 461; *Mears v. Commonwealth*, 2 Grant, 385; 1 Bouvier's Law Dic. 578; 2 Hale P. C. 184; 1 Chitty Crim. Law [242], [243]; 2 Hawk. P. C. c. 25, § 55; Cro. Eliz. 198; 4 Black. Com. 307; 1 Burrill's Law Dic. 612. Our statute has not changed this rule. Code 1871, § 2672, does not create a new offence or change rape as it was known at common law. The object of that statute was to fix the punishment for the crime, and to make distinction between forcible ravishment and the carnal knowledge of a female who had no capacity to consent to the act. *Jesse v. State*, 28 Miss. 100; 1 Bish. Crim. Proc. § 348; *Sarah v. State*, 28 Miss. 267. To charge that the assault was felonious is not sufficient, but it must be charged that the rape was felonious. *State v. Scott*, 72 N. C. 461; 1 Arch. Crim. Prac. 999, note

1; 1 Russell on Crimes, 920; 1 Hale, 682; 1 Arch. Crim. Pl. & Pr. p. 784; *Respublica v. Honeyman*, 2 Dallas, 228; *Commonwealth v. Gibson*, 2 Va. Cas. 70; *State v. Johnson*, 67 N. C. 55; *Fouts v. State*, 8 Ohio St. 98; *Kain v. State*, 8 Ohio St. 306; *Hagan v. State*, 10 Ohio St. 459. Any substantial error in charging the offence, which would have been fatal on general demurrer or motion in arrest of judgment, may be urged in error. *Kirk v. State*, 18 S. & M. 406; *Jesse v. State*, 28 Miss. 100; *Jefferson v. State*, 46 Miss. 270; *Thompson v. State*, 51 Miss. 858.

*Fred. Beall*, on the same side, argued orally and in writing.

The motion for a new trial should have been sustained, on the ground that the verdict is contrary to the law and evidence. The plaintiff in error was not charged with felony. The language of the statute must be preceded by the word "feloniously." *Commonwealth v. Fogerty*, 8 Gray, 489; 1 Chitty Crim. Law, 281; *Williams v. State*, 8 Humph. 585. In indictments for rape, the words "feloniously ravished" are essential. 1 Wharton Crim. Law, § 401; *Gouglemann v. People*, 8 Parker C. R. (N. Y.) 15; 1 Hale P. C. 628, 632; 2 Hale P. C. 184; *State v. Jim*, 1 Dev. (N. C.) 142; 1 Inst. 190; 2 Inst. 180; *Kellenbeck v. State*, 10 Md. 431; *Harman v. Commonwealth*, 12 Serg. & R. 69; *State v. Jesse*, 2 Dev. & Bat. 297. It will be seen by comparing the statute of Massachusetts (Rev. Sts. c. 137, § 14), with Code 1871, § 2884, that one is, in substance, a copy of the other. The Supreme Court of Massachusetts, in *Commonwealth v. Scannel*, 11 Cush. 547, said that the omission of the word "felonious," under that statute, would have been fatal. No circumlocution whatever will supply the want of the word. *Gouglemann v. People*, *ubi supra*; *Harrington v. State*, 54 Miss. 490; *State v. Raines*, 3 McCord, 533. Objection was not taken to the indictment in the court below by demurrer or motion to quash, because the indictment was good as charging an assault, and would not have been quashed. We object now because the sentence is for a felony; the offence charged only a misdemeanor.

*T. C. Catchings*, Attorney General, for the State, filed a brief and argued the case orally.

The indictment is not bad because of the failure to aver

that the ravishment was done feloniously. It is good under Code 1871, § 2672, for that section contains a full description of the offence. *Jesse v. State*, 28 Miss. 109; *Sarah v. State*, 28 Miss. 267; *Harrington v. State*, 54 Miss. 490; *Commonwealth v. Stout*, 7 B. Mon. 247; *State v. Eldridge*, 7 Eng. (Ark.) 608. Felonious intent is no part of the description of rape, as the offence is complete without it. Even at common law the intent was immaterial. 1 Russell on Crimes, 902. At common law the procedure was different in cases of felony and misdemeanor, and the use of the word "feloniously" served no purpose, except to communicate to the court the information necessary to direct it how to order the course of the trial. 1 Bishop Crim. Proc. §§ 288, 289. It is now a useless technicality, and will be restricted to indictments under the common law. In many States it is held that it need not be used in indictments founded upon statutes, unless it is used in the statutes themselves. That is certainly the correct rule, and will no doubt be accepted as such by this court. 1 Bishop Crim. Proc. § 290. In the case at bar the indictment follows substantially the language of the statute defining rape; and, as that makes no use of the word "feloniously," it is unnecessary that it should appear in the indictment. The indictment is also expressly made good by Code 1871, § 2864. It was so held by the Supreme Court of Tennessee in the case of *Peek v. State*, 2 Humph. 78, under a statute substantially the same as ours. Again, the use of the words is a mere form, *State v. Eldridge*, 7 Eng. (Ark.) 608, and its omission from the indictment could not be urged, except by demurrer or motion to quash before the jury was impanelled. Code 1871, § 2805. Whether the omission is a defect of form or substance, it was cured by the verdict, under Code 1871, § 2884. Finally, a fair construction of the language of the indictment makes it sufficient, even if it should be held that the word feloniously is essential.

GEORGE, C. J., delivered the opinion of the court.

The plaintiff in error was indicted for rape, convicted, and sentenced to imprisonment in the Penitentiary for life. It is objected here that the indictment is not sufficient, because

the ravishment is not charged to have been done feloniously. The indictment charges that the prisoner, "with force and arms, in and upon one Nelly Edwards, a female over the age of ten years then being, violently and feloniously did make an assault, and her, the said Nelly Edwards, then and there forcibly and against her will, did then and there ravish and carnally know, against the peace, etc."

The objection that the word "feloniously" should have been repeated in connection with "ravish" seems to be clearly sustained by the authorities, if we consider that the indictment is to be treated as charging the common-law offence. The Attorney General, however, insists that the offence of rape is fully defined by the statute (Code 1871, § 2672); and that this indictment is good under that section, which is in the following words: "Every person who shall be convicted of rape, either by carnally and unlawfully knowing a female child under the age of ten years, or by forcibly ravishing any female of the age of ten years and upwards, shall be punished," etc. But we do not consider that the statute was intended to define fully and clearly the offence, but rather to impose a punishment for rape. The case comes under the rule laid down in *Jesse v. The State*, 28 Miss. 100: "If the words used in the statute do not, in view of the nature of the offence and the recognized principles of law, describe the offence so as to convey to the mind a full and clear idea of every thing necessary to constitute the crime, in such case the full measure of the offence must be charged by the use of such words as are necessary and proper, under established rules of law, to characterize it."

One of the assignments of error is, that the court erred in refusing a new trial, which, as the indictment is defective for the principal offence attempted to be charged in it, though good for a mere assault, we will sustain, without inquiring specially into the grounds upon which it is based, so that the cause may be remanded, either for a new trial for the assault in the indictment as it now stands, or that the court may quash the indictment, and that a new one may be found properly framed for the trial of the crime of rape.

*Judgment accordingly.*



## T. H. CLOPTON, ADMR., ETC. v. R. HAUGHTON, JR. ET AL.

1. CREDITORS' ADMINISTRATION BILL. *Jurisdiction of Chancery Court.*

Under Code 1871, § 976, the Chancery Court has jurisdiction of a bill against an executor by creditors of the testator with judgments against the estate, to compel final settlement, or payment of their *pro rata* shares in advance of such settlement.

2. SAME. *Estates of deceased persons. Devastavit. Probate remedies.*

The Chancery Court, by virtue of the statute, has power to establish a *devastavit* and render a personal decree against the executor and his sureties, and is not restricted to the old probate remedies embodied in the Code.

3. SAME. *Practice. Executor as trustee. Limits of jurisdiction.*

The court may treat the executor as the holder of a trust fund, taking care not to violate any of the special provisions of other sections of the Code, or trench on the jurisdiction of other tribunals.

4. SAME. *Parties. Executor's administrator. Revivor.*

If the executor dies pending suit, it is necessary to revive against his administrator in order to procure the filing of his account or to obtain a personal decree for a *devastavit*.

5. SAME. *Successor in administration. Amendment.*

If the assets of the estate have gone to an administrator *de bonis non cum testamento annexo*, he should be made a party to the bill, which, in a proper case, may be done by an amendment.

APPEAL from the Chancery Court of Monroe County.

Hon. L. HAUGHTON, Chancellor.

*Murphy, Sykes & Bristow*, for the appellant.

The revivor was under the original bill, the demurrer was to the bill as amended, and while the revivor could not have been made on the latter, the executor's administrator against whom the former was revived is entitled to the benefit of its defects. The revivor should have been against the successor in the administration, not against the executor's personal representative. The original bill is neither for an account under § 1120 of the Code, nor to establish the executor's individual liability under § 976, and is filed not by legatees or distributees, but by a part of the creditors. The amendment after the erroneous revivor cannot cure it. But the amended bill, which attempts to charge a *devastavit*, and asks for a personal

decree, is demurrable. None but proceedings on administration bonds have been held to be within the jurisdiction of the court. *Bank of Mississippi v. Duncan*, 52 Miss. 740; *Walker v. State*, 53 Miss. 532; *Brunini v. Pera*, 54 Miss. 649; *Buie v. Pollock*, 55 Miss. 309. If the amended bill is taken as confessed, no decree can be rendered. No final settlement can be decreed, because the debts have not been paid. Code 1871, § 1166. No distribution can be had, because it would be *pro rata* and to a part only of the creditors, and not by insolvency proceedings. Code 1871, § 1158, 1162. For the same reasons the bill is insufficient to establish a *devastavit*. *Dobbins v. Halfacre*, 52 Miss. 561; *Whitfield v. Evans*, 56 Miss. 488; 2 Lomax on Executors, 475; Story Eq. Pl. § 257.

*Houston & Reynolds*, for the appellees.

The object of the proceeding is to charge W. H. Clopton personally with a *devastavit*, and the original bill states the necessary facts and asks for that relief. *Vick v. House*, 2 How. 617; *Whitfield v. Evans*, 56 Miss. 488. The demurrer was to the whole bill. It has never been controverted that a court of chancery in this State has jurisdiction to establish a *devastavit* against an executor and enforce the same by a personal judgment. The controversy has been whether in such a proceeding the sureties of the executor could be joined, and it has been repeatedly adjudicated, that the sureties may be joined with the administrator or executor. The bill is filed by the complainants for themselves and all other creditors who will join in the proceeding.

CHALMERS, J., delivered the opinion of the court.

Sundry creditors of James H. Haughton, deceased, having reduced their demands to judgments against W. H. Clopton, his executor, filed this bill in the Chancery Court of Monroe County, representing that said executor, though he had been appointed and acting as such for more than ten years, and had collected, and then held in his hands, assets and money of the estate, failed and refused to pay off the debts; that he had mingled the money of the estate with his own, and failed to make a final or even partial settlement of his accounts with the court. The prayer was that he be

cited to show cause why he should not make a final settlement, and if such settlement was found impracticable that he should be required to pay off the complainants' debts, or so much thereof as they might be found entitled to, out of the money on hand. By an amended bill there was added a charge that the executor had converted the assets to his own use, and a prayer for a personal decree against him as upon a *devastavit*. It is objected by demurrer that the bill is not maintainable, except as an application to compel the filing of an annual account, since no final settlement can be made until all debts are paid, and the bill shows that this has not been done, nor is there any process, except through regular proceedings of insolvency, by which an administrator can be compelled to make *pro rata* distribution to creditors.

Under our old course of probate proceedings, and even under our present chancery system, independently of Code 1871, § 976, these objections would be fatal to the bill, except in so far as it seeks the production of an annual account. But that section greatly broadens the power of the court, even while exercising its probate jurisdiction, and confers upon it in the discharge of that jurisdiction the right to employ, in furtherance of the objects pointed out by the section, the multiform and elastic remedies of a court of equity. It declares that "in addition to the powers and jurisdiction hereinbefore conferred upon said Chancery Court, the courts in which the will may have been admitted to probate, letters of administration granted, or guardians may have been appointed, shall have power and jurisdiction to hear and determine all questions in relation to the execution of the trusts . . . and of all demands against the same, and such estates, whether claimed by heirs-at-law, distributees, devisees, legatees, wards, creditors, or otherwise, and shall have power and jurisdiction in all cases in which bonds or other obligations shall have been executed . . . to hear and determine, upon proper proceedings and proof, the liability of the obligors in such bond or obligation, whether as principal or surety, and by decree and process to enforce such liability."

The effect of this statute is to authorize creditors, as well as heirs and distributees, to invoke the jurisdiction of the

court to hear and determine their demands against the custodians of the estates of decedents, in order that a due performance of their trusts may be enforced by remedies appropriate to the varying exigencies of the case. Whether the term "creditors," as here used, applies only to judgment creditors, and was not intended to draw into a court of chancery the adjudication of purely legal demands, is not necessary to be here decided, since the complainants have, in courts of law, reduced their demands to judgment. Having done so, they represent to the court that its officer, who is their trustee, has appropriated the assets of the estate, and refuses either to pay, or to make report of the state of his accounts. To hold that no final account can be compelled because the debts have not been paid, and that heirs only can demand a partial distribution of money on hand, would be to thwart the manifest intent of the statute, which is to vest the court with full power and jurisdiction to so deal with the trustee and the funds in his hands as to ensure a faithful performance of duty and a prompt application of assets to those entitled to them, whether they be heirs or creditors.

It declares that "in addition to the powers and jurisdiction hereinbefore conferred," which embraces all the powers theretofore belonging to the old Probate Courts, a new jurisdiction is given, namely, "to hear and determine all questions in relation to the execution of the trusts," at the instance either of heirs or creditors, to declare the liability of the trustee and his sureties, "and by decree and process to enforce such liability." Manifestly the court is not restricted either as to the circumstances which call for its interposition, or in the measure of relief afforded, by the special provisions pertaining to the old Probate Court, as re-enacted in the Code, but may treat the administrator as the holder of a trust-fund, and conform its orders and decrees to the case before it, taking care only not to violate any of the special provisions of other sections of the Code, and not to trench upon the jurisdiction of any other tribunal.

We think that the demurrer was properly overruled; that upon final hearing, when the executor shall have filed his accounts, with a full statement of the condition of the estate

both as to debts and assets, it will be within the power of the court to grant the relief prayed for, care being taken so to shape its decrees and orders as to protect the interests of heirs and legatees as well as of those creditors who are not here joined. It is within the authority conferred by the statute upon the Chancery Court to establish a *devastavit*, and to render a personal decree against the executor and his sureties.

The executor died after the bill was filed, and the cause was revived against his administrator. It is insisted that this was erroneous, and that it should have been revived against the successor of the executor; to wit, the administrator *de bonis non cum testamento annexo* of James H. Haughton. It was necessary to revive against the administrator of the executor in order to procure the filing of the account, as well as to obtain the personal decree if the *devastavit* should be established. It may be necessary, also, to join the administrator *de bonis non cum testamento annexo* of Haughton, if the assets of the estate have gone into his hands. This may be done by amendment.

*Affirmed and remanded.*

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JOHN W. CRISLER ET AL. v. FARRAR MORRISON.

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192	287

1. CONTESTED ELECTIONS. *County office. Summons. Jurisdiction.*

In a case of contested election for a county office, under the act of March 5, 1878 (Acts 1878, p. 178), failure of the justice of the peace to issue and make returnable the summons within twenty-five days after the election establishes *prima facie* want of jurisdiction, which can be met by the contestant, if at all, only by averment and proof that the delay was not the result of his concurrence or neglect.

2. SAME. *Prohibition. Alternative writ. Petition.*

Upon the sworn petition of the defendant in such a case, stating the facts, and averring that the summons was not issued when the petition for contest was filed by direction of the contestant, who is illegally proceeding to procure a verdict, an alternative writ of prohibition may issue, returnable to the Circuit Court, notwithstanding the right of appeal without *supersedeas*, to the same tribunal under the statute.

8. *SAME. Practice in prohibition proceedings: Declaration. Waiver.*

The contestant and justice, who appear to the alternative writ, cannot compel the petitioner in the prohibition proceeding to file a declaration without showing a disputed fact, to be settled before the absolute writ is directed to issue; and, if they acquiesce in the hearing of his motion for an absolute writ for want of an answer to his petition, they waive their prior motion for a declaration.

ERROR to the Circuit Court of Hinds County.

Hon. S. S. CALHOON, Judge.

*J. W. Jenkins* and *H. R. Ware*, for the plaintiffs in error, filed a brief, and each argued the case orally.

1. The summons for Morrison in the contested election case was issued legally as to time, and, if not, this would not take from the justice jurisdiction, but simply present a question of limitation. Acts 1878, p. 173. The only limitation is in the time of filing the petition, which must be "within twenty days after the election." That was done in this case. It is nowhere said that the summons shall issue within that time. The law merely provides that "the justice shall thereupon issue a summons." The word "thereupon" does not in this connection refer to time, but to the cause, reason or authority for issuing the writ. Its use in similar connections elsewhere in our statutes clearly establishes this view. Code 1871, §§ 389, 390, 1305, 1819, 1826, 1838. The Supreme Court of Maine gave to the word the same construction when used in pleading. *Bean v. Ayers*, 67 Maine, 482. Under the decision in *Ex parte Wimberly*, ante, 437, the contest is limited to the first Monday in January. No evil consequences, therefore, can result from this construction. The filing of Crisler's petition within the time prescribed by law gave the justice jurisdiction of the case, with power to do all things necessary to bring the defendant into court, make up the issue, and proceed to final judgment. He did not lose that jurisdiction by delaying the issuance of the summons five days. The delay being a matter of limitation only, it was a personal privilege, and could be pleaded or not, as the defendant saw proper, and did not affect the jurisdiction of the court. *Commercial Bank v. Martin*, 9 S. & M. 613; *Doe v. McDonald*, 27 Miss. 610.

2. The writ of prohibition is not the proper remedy in a case like this. Its office is not to correct the errors of inferior courts, but to prohibit them from assuming jurisdiction not given by law. Before a court will be authorized to grant the writ, it must determine that the cause originally, or some collateral matter arising therein, does not belong to the inferior court, but to the cognizance of some other tribunal. 8 Black. Com. 83, 84; *State v. Judge*, 11 La. Ann. 696; *People v. Wayne Circuit Court*, 11 Mich. 393; *People v. Seward*, 7 Wend. 518; *People v. Marine Court*, 36 Barb. 341; *Law v. Crown Point Mining Co.*, 2 Nev. 75; *State v. Judge*, 11 Wis. 50; Bacon's Abr. title Prohibition; *Clayton v. Heidelberg*, 9 S. & M. 623; *Planters' Ins. Co. v. Cramer*, 47 Miss. 200. The misinterpretation of a statute by an inferior court, the consideration of which arises incidentally in a proceeding which is within its jurisdiction, is a matter of appeal rather than a ground for prohibition. *Mayo v. James*, 12 Gratt. 17; *Home v. Earl Camden*, 2 H. Black. 533; Bacon's Abr. title Prohibition; *Grant v. Gould*, 2 H. Black. 69; *State v. Wakely*, 2 Nott & McCord, 410; *Washburn v. Phillips*, 2 Met. 296. The writ of prohibition will never lie when the right of appeal is given. *Law v. Crown Point Mining Co.*, 2 Nev. 75; *People v. Marine Court*, 36 Barb. 341; *People v. Court of Common Pleas*, 43 Barb. 278; 7 Com. Dig. 141; *People v. Seward*, 7 Wend. 518; *Arnold v. Shields*, 5 Dana, 18; *Ex parte Hamilton*, 51 Ala. 62. The law under which the contested election case was brought gives the right of appeal. Acts 1878, p. 174.

3. The Circuit Court had no power to refuse the motion of the plaintiffs in error to compel the defendant in error to file a declaration. If the defendant in a writ of prohibition demands that a declaration shall be filed, the court must require it to be done, so that an issue may be made up to try the truth of the allegations of the petition upon which the writ was granted. Bacon's Abr. title Prohibition; *Mayo v. James*, 12 Gratt. 17; *Home v. Earl Camden*, 2 H. Black. 533; *Ex parte Williams*, 4 Pike, 537; 7 Com. Dig. 171.

*W. L. Nugent*, for the defendant in error, made an oral argument.

*Nugent & McWillie*, on the same side.

1. Writs of prohibition were granted in England both in the Common Pleas and King's Bench. They lay where an inferior court was proceeding without jurisdiction, or where the jurisdiction properly belonged to another court, or where the inferior court transcended its jurisdiction, or where a plaintiff had one demand and split it into several actions, so as to give an inferior court jurisdiction, or where the judges proceeded in cases where they were prohibited by act of Parliament. *Ex parte Williams*, 4 Pike, 537; *Arnold v. Shields*, 5 Dana, 18; *Mayo v. James*, 12 Gratt. 17; *Withers v. Commissioners*, 3 Brev. 83. The writ may issue where there is an undue exercise or unlawful stretch of delegated power, or to prevent the exercise of unauthorized power in a cause or proceeding of which the subordinate tribunal has jurisdiction no less than where the entire cause is without its jurisdiction, or where, in handling matters within its jurisdiction, an inferior tribunal transgresses the bounds prescribed to it by law. It issues upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, and its office is to prevent the exercise by a tribunal possessing judicial powers, of jurisdiction over matters not within its cognizance, or to prevent it from exceeding its jurisdiction in matters within its cognizance. *Planters' Ins. Co. v. Cramer*, 47 Miss. 200; *Clayton v. Heidelberg*, 9 S. & M. 623; *Quimbo Appo v. People*, 20 N. Y. 531, 541; *Zylstra v. Corporation of Charleston*, 1 Bay, 382; *State v. Ridgell*, 2 Bailey, 560; *Commissioners v. Spittler*, 13 Ind. 235; *Thomson v. Tracy*, 60 N. Y. 31; *State v. Brown*, 31 Wis. 600.

2. In view of these authorities the alternative writ was properly issued in this case, if the magistrate had no jurisdiction to issue the summons after the lapse of twenty days, and this we now consider. The statute is imperative. The petition to contest the election must be filed within twenty days; it must set forth the grounds of contest; the magistrate shall thereupon issue a summons returnable five days after the filing of the petition; he shall make up the issue and summon and impanel a jury to try it. Acts 1878, p. 173. The proceeding



is special and summary. It derives vitality from the statute, and its life and vigor depend upon and are controlled by the statute. *Keller v. Chapman*, 34 Cal. 685. The issuance of the writ within the time limited goes to the root of the whole controversy; it is jurisdictional in character. Otherwise, the magistrate might wait six months, or a year, if the petition were filed within twenty days; and long after the issuance of a commission to the party returned elected, and his installation in office, his right to the office, the duties of which he had undertaken, might be the subject-matter of contest. The letter and spirit of the law are against such a construction. *Ex parte Wimberly*, ante, 437; *Lindsey v. Luckett*, 20 Texas, 516; *Hyde v. Trewitt*, 7 Cold. 59; *State v. Stewart*, 26 Ohio St. 216; *Dickey v. Reed*, 78 Ill. 261; *Harrison v. Lewis*, 6 W. Va. 713. The rule should be applied much more strongly here, because Crisler is himself responsible for the delay in the issuance of the summons. He did not demand the issuance of the writ, but directed it not to be issued. *Allen v. Mandaville*, 26 Miss. 397; *Lamkin v. Nye*, 43 Miss. 241; Angell on Lim. § 312. The petition to contest the election does not set forth specifications, but deals wholly in conclusions of fact, and if admitted or proved would not entitle Crisler to the office. *Harrison v. Lewis*, 6 W. Va. 713; *Lanier v. Gallatas*, 18 La. Ann. 175; *Taylor v. Taylor*, 10 Minn. 107; *Wilson v. Lucas*, 43 Mo. 290.

3. After the motion of the defendant in error for a peremptory writ, because the defendants below had not answered the petition but confessed its allegations of fact, was sustained, the defendants below moved the court to compel the plaintiff to declare in prohibition, and the motion was overruled. It is here insisted that the lower court erred. The practice pursued in this case is the modern practice, as held in *Arnold v. Shields*, 5 Dana, 18, and the declaration was wholly unnecessary after the case was decided. It was the rule at common law, because without it there could be no writ of error. It now rests wholly in the discretion of the court. *State v. Allen*, 2 Ired. 183; *Mayo v. James*, 12 Gratt. 17. The facts were all admitted to be true, and the declaration was not called for until the case was decided. There was no

reason, therefore, for a declaration. *Ex parte Williams*, 4 Pike, 537; *State v. Milwaukee Common Council*, 20 Wis. 87, 89; *Wells v. Milwaukee Railway Co.* 30 Wis. 605; *People v. College of Physicians*, 7 How. Pr. 290; *Mayo v. James*, *ubi supra*; *Supervisors of Culpeper v. Gorrell*, 20 Gratt. 484; High on Ext. Legal Remedies, § 799. Besides, our statutes abolish all common-law fictions. Code 1871, §§ 576, 577.

GEORGE, C. J., delivered the opinion of the court.

On the 22d day of November, 1879, one of the plaintiffs in error, Crisler, filed before G. M. Lewis, a justice of the peace of Hinds County, his petition against the defendant in error, for the purpose of contesting the latter's election to the office of sheriff of that county. Certain grounds were stated in the petition, on which the plaintiff's right to the office was founded. As to the sufficiency of these grounds, it is unnecessary to express any opinion, as, under our view, the rights of the parties can be settled without determining the questions raised on the sufficiency of the petition in this respect. On the 27th day of the same month, the justice of the peace issued a summons for Morrison, returnable on the 2d day of December. The summons was executed on the day it was issued. On the return of the summons, Morrison appeared, and moved to quash the summons on several grounds, one of which was, that it was issued after the expiration of the time within which, by law, it could be issued. This motion was overruled, and Morrison then protested against the further action of the court in this proceeding, and moved the court to dismiss it, because it was instituted and was being prosecuted in contravention of the Constitution and laws of the State and of common right. This motion was also overruled. A jury was then organized to try the issue, and a witness sworn and placed on the stand, when a rule *nisi* for a writ of prohibition was served on the justice of the peace and Crisler. The rule was entered on the 9th day of December, 1879, by the circuit clerk of Hinds County, upon the fiat of one of the associate justices of this court. This fiat was based on a petition of Morrison, verified by his oath, in which he set out the foregoing proceedings before the justice of the peace. The

petition further set out that when the petition was filed before the justice of the peace, no summons was issued on it by the express direction and consent of the petitioner, and claimed as matter of law that said summons could not be legally issued and be made returnable after the expiration of the twenty days from the election in which the statute required the petition to be filed, and after the additional five days provided by the statute, at the end of which it was to be made returnable; that the election was held on Nov. 4, 1879, and the summons was made returnable on Dec. 2, following, and that the latest day on which the summons could be made returnable was Nov. 29. The petitioner claimed that, owing to this delay, the justice of the peace never acquired jurisdiction of the cause. The petition also stated that the justice of the peace was hostile to the petitioner, and took an active part in the election against him; that he held his court in the country, five miles from any city or town, where there were no accommodations for man or beast, and no sort of protection against the inclemency of the weather, and no means of adequately preparing for the petitioner's defence; that, during the day, the house in which the court was held was crowded to suffocation by the number of attending witnesses; and that the whole proceeding was begun and was being conducted to procure an illegal and fraudulent verdict.

At the January term of the Circuit Court, from which the alternative writ of prohibition issued, the plaintiffs in error, Crisler and Lewis, filed a motion, in which they insisted that the petitioner should file a declaration, and asked the court to compel the filing of such declaration. This paper was filed on Jan. 6, 1880. On the next day, without any disposition having been made of the former motion, and without, so far as the record shows, the attention of the court being called to it, they made another motion, asking the court to dismiss the alternative writ of prohibition, because the same was illegally and fraudulently issued. On the next day to this, the petitioner filed his motion that the rule *nisi* be made final and absolute and a writ of prohibition issue, because no answer had been made to the petition on which the rule *nisi* was based and no cause to the contrary had been shown. On the 10th of

January, as the judgment of the court recites in the cause of *Farrar Morrison v. Crisler and Lewis*, the parties came by their attorneys, and thereupon came on to be heard, the motion of the defendants, to dismiss the writ of prohibition issued and served in this case, because the same was illegally and fraudulently sued out, as well as the motion of the plaintiff to make the said writ final and absolute, no answer being filed by the defendants; and, after argument, the court overruled the motion to dismiss, and sustained the motion to make the rule absolute, and ordered the writ of prohibition to issue. After the judgment, the motion entered on Jan. 6, to compel the plaintiff to file a declaration, was heard and overruled.

The first and most important question presented by the record is, whether, under the facts shown in the petition, the justice of the peace had any jurisdiction to try the case? The powers of a justice of the peace, and of the tribunal organized by him, for the trial of an issue arising out of a contested election, are special and limited, — special, in that they are specifically enumerated in the statute; and limited, in that they are restricted in operation by the circumstances associated with their exercise in the statute. They are no part of his general jurisdiction. The statute (Acts 1878, p. 173) provides that any person desiring to contest any county election “may, within twenty days after the election, file a petition before any justice of the peace of such county, setting forth the grounds upon which said election is contested; and the justice shall thereupon issue a summons to the party whose election is contested, returnable five days thereafter, which summons shall be served as in other cases.” The object of the statute was to secure a speedy trial of such issues, so that it might be determined by the first Monday in the succeeding January, when the term of the officers elected in the preceding November begins, who were properly elected. The question to be settled by the trial is not one in which the contestants alone are interested. The State also has an interest that a majority of the electors shall have their choice as made known in the manner prescribed by law, and that no one shall usurp or fraudulently acquire an office contrary to law. *Lindsey v. Luckett*, 20 Texas, 516. In *Searcy v. Grow*, 15 Cal. 117, it was held by the court

that the public is interested in a contest of this character; it is not a matter solely between the parties to the record; and the popular will (as shown by the certificate of the returning officers) is not to be set aside upon the mere failure of a party to respond to charges alleged against his right. On these principles the Supreme Court of Texas, in the case heretofore cited, held, that the time prescribed by the statute, in which proceedings to contest an election shall be commenced, was essentially jurisdictional; and that, the proceedings not having been commenced within that time, the judgment of the court was void, and did not deprive the party having the certificate from the proper election-officers of his right to the office. There can be no controversy, therefore, that if Crisler had failed to file his petition within the twenty days, he could not afterwards effectually file it. Does the same rule apply to the issuance and return of the summons? This writ is just as essential as the petition. Neither, without the other, had any legal value whatever. The statute seems to contemplate that the summons should issue immediately upon the filing of the petition; and it is expressly required to be made returnable five days after such filing. Unless we adopt this construction, there is nothing in the statute to prevent the issuance and return of the summons, at any time during the succeeding two or four years, as the case may be, which constitutes the term of office of the officer whose right is contested. If the summons was allowed to be issued at any time subsequent to the filing of the petition, the provision requiring the filing of the petition within twenty days after the election, performs no useful office, and might as well have been omitted from the statute. We have seen that the object of the statute was to secure a speedy settlement of all contested elections, and this object cannot be accomplished on any other construction than the one we have adopted. To allow the filing of the petition, within the time prescribed, as a sufficient compliance with the statute, leaving it to the contestant to go on or not at any future time with the contest, would moreover be followed by most deleterious consequences to the public service. Under this view, the filing of the petition would be but a threat to contest at some future time, to be carried out or not according

as the petitioner might succeed or not in securing terms of compromise or settlement from the person declared elected. This would tend to bring about improper compromises and arrangements between individuals concerning the incumbency of public offices, which, under our system, ought only to be determined by the qualified voters of the county. During the period in which the threatened contest should remain unsettled, the efficiency and the authority of the officer would be diminished, and the excitement, animosities and partisan feelings necessarily engendered during the canvass preceding the election, and which generally subside at its termination, would be kept alive to the great detriment of the public. But it is argued, in opposition to this view, that, according to the principles which have been settled in this court, the contest is contemplated by the statute to terminate by the first Monday in January next succeeding the election; and that this decision would prevent the issuance of the summons after that time, and hence, the consequences we have mentioned could not follow from the construction we have condemned. The answer to this is that, but for the construction we have adopted, there is nothing in the statute which could authorize the court to make the announcement above referred to. The idea that time is essential in election proceedings is a familiar one. Elections can only be held on the day and within the hours fixed by law. The inspectors have no power to receive a ballot on any other day, or even on the proper day before or after the hours prescribed by law, whatever reason to the contrary may be urged by the electors. The legislature must, therefore, have meant that a real, and not a merely colorable and threatened contest, to be perfected and consummated or abandoned at the will of the contestant, should be inaugurated within the time prescribed by the statute. Without the issuing of the summons, nothing could be done which would have any validity. It is unnecessary to decide whether it was essential that the summons should be issued immediately upon the filing of the petition, if it were actually issued and made returnable within the longest period, viz., twenty-five days, allowed by the statute for its return, since in this case it was not made returnable until after that time. Nor is it necessary to decide

whether the mere failure of the justice of the peace to issue the summons on the filing of the petition within the prescribed time would defeat his jurisdiction. The fact that the statute gives the right to the contestant to select from the justices of the peace in the county that one before whom he will file his petition, and the resulting agency of the justice of the peace thus selected by the petitioner in the mere ministerial act of issuing the summons, might with great force be urged in support of the view that the jurisdiction would not be acquired, if the failure to issue the summons was the result alone of the omission of that officer. We now only hold that the failure to issue the summons in proper time establishes *prima facie* the want of jurisdiction; and that this *prima facie* case can only be overturned, if at all, by the averment and proof on the part of the contestant that the delay was not the result of his consent, concurrence or neglect in demanding the issuance of the writ in proper time.

This brings us to the consideration of the question as to the propriety of the issuance of the writ of prohibition. The object of this writ is not only to prevent courts from usurping a jurisdiction not conferred on them by law so as to preserve the rightful powers of other courts, but it will lie against a pretended court usurping a jurisdiction which belongs to no other court. Bacon's Abr. title Prohibition. This latter is one of its most useful offices, for, as was said in *Ex parte Roundtree*, 51 Ala. 42, 51, "the usurpation of judicial power — the holding of pretended courts — is a great public wrong, productive of uncertainty and confusion; beclouding the title to property, vexing and harassing the citizen, involving him in a conflict of duties, subjecting him to oppression, and detracting from the dignity and authority of the known and established tribunals. It would be a reproach to the law and to justice, if there was not a speedy remedy to prevent such usurpation." To the same effect is *Arnold v. Shields*, 5 Dana, 18. This court, thus organized by the justice of the peace without authority of law, partakes very much of the character of, if it is not exactly, the pretended court described in the quotation above made. Such a tribunal, owing to its defective organization, has no power or jurisdiction whatever. It cannot even

exercise the powers which by law were vested in justices of the peace acting separately. Organized in any other mode or at any other time than prescribed by law, it has no more power than the same number of private citizens associated by their own will for the performance of judicial functions. If in any case a writ of prohibition is proper, it should issue to prohibit such a tribunal from exercising the usurped power of reversing the will of the voters of the county as declared by the properly constituted officers.

It is, however, said that the right of appeal was given by the statute; and when such right is given, the writ will not be issued. If this tribunal is conceded to have enough of colorable judicial authority to authorize it to grant an appeal, still the rule invoked will not apply here. It is unnecessary to determine exactly the rule by which courts are governed in refusing to grant the writ, because an appeal or writ of error or of *certiorari* will lie. It is certain that, when it is refused on that ground, the remedy by revisory proceedings must be adequate. In this case the remedy is not adequate to the mischief either to the contestee or to the public. Morrison would be deprived of the emoluments of the office till the adverse judgment could be reversed, and the public would be subjected to the jurisdiction and power of an officer whose only title to the office would be the judgment of an illegal tribunal. For it must be noted that the argument we are now answering — viz., that the remedy for the admitted exercise of usurped power is by appeal — concedes that Morrison is lawfully entitled to the office, and that his ejection by this tribunal would be unlawful. The case is clearly within the rule laid down by this court in *Planters' Ins. Co. v. Cramer*, 47 Miss. 200, where it was said that when an appeal lay, the writ would not issue, except the matter was urgent, and likely to result in great mischief. In a clear case of usurpation like this, the courts have refused to consider the right of appeal as a reason for denying the writ. Thus in *Quimbo Appo v. People*, 20 N. Y. 581, 542, it was said, "The writ was never governed by any narrow technical rules, but was resorted to as a convenient mode of exercising a wholesome control over inferior tribunals. The scope of this remedy ought not to be abridged, as it is far better to prevent



the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it is committed." And in *State v. Judge*, 20 La. Ann. 239, the court said, "Where it clearly appears that a judge is exceeding his jurisdiction, or is without jurisdiction, the writ of prohibition may issue to restrain him, and that the complaining defendant should not be required to await an expensive and vexatious litigation, in order to obtain relief by appeal." To the same effect is *Worthington v. Jeffries*, L. R. 10 C. B. 379. These authorities go further than is necessary to sustain the writ in this case.

It is next urged in opposition to the action of the court below, that the motion of the plaintiffs in error to require a declaration to be filed, should have been granted. The right which existed at common law in the defendant in prohibition to demand the filing of a declaration, does not exist in this State for obvious reasons. In *St. John's College v. Todington*, 1 Burr. 158, Lord Mansfield said, "When the court is clearly of opinion that there is sufficient ground for the prohibition, the defendant has a right to put the plaintiff to declare; that his jurisdiction may not be taken from him in a summary way, where no writ of error will lie." The right was put solely upon the ground that, without it, the defendant would not be entitled to a writ of error, to revise the judgment thus rendered against him. The right to a writ of error in prohibition proceedings does not at all depend, in this State, upon the fact that the judgment of the court below was rendered upon regular proceedings by declaration, plea, or demurrer. An examination of the original record in the High Court of Errors and Appeals, in the case of *Donovan v. Vicksburg*, 29 Miss. 247, shows that the judgment there was rendered on the petition alone, and a writ of error was maintained and the judgment reversed without any suggestion that the writ of error was improperly sued out. If the writ could not be maintained except after declaration filed, the controversy we are now settling could not have arisen before us, since we would, in that view of the law, have been compelled to dismiss the writ for want of jurisdiction. It is thus shown that the main ground for the right to demand a declaration, as it was recognized in England, does not exist here, and *cessante*

*ratione legis cessat ipsa lex.* The other ground on which a declaration might be required to be filed was when the court deemed the point too nice or doubtful on the law or facts to be decided upon motion. High on Ext. Legal Remedies, 575; *Supervisors of Culpeper v. Gorrell*, 20 Gratt. 484. On the face of the record of the justice of the peace, filed with the petition, the points involved were not nice or doubtful. On the record as it stood, the tribunal was clearly without jurisdiction, and there was no possibility of maintaining the jurisdiction, except upon the averment by Crisler that the delay in issuing the summons was the sole act of the justice, and was without his consent and contrary to his demand and wishes. It is even doubtful, as before stated, whether he would be allowed to make this averment. But proceeding on the theory that he had such right, it was his duty, in making the request of the court, to show, by suggestion at least, that there existed a fact *dehors* the record—which could be proved, and when established would show that the court had jurisdiction. Without such averment on his part, there was no case in which there could be any doubt or nicety, requiring more formal proceedings for the determination of the controversy; and there remained before the court only a clear case for the granting of the writ, in which, as we have shown, the right to demand a declaration does not exist in this State. A declaration could perform no useful office unless there was an issue to be settled by a jury, and no such issue was asked for or suggested. Moreover, all fictions in pleading are abolished by our statute (Code 1871, § 576), and the declaration at common law in prohibition was based on the fiction that a writ of prohibition had been granted, and had been violated by the defendants; and the use of such fictions is absolutely prohibited by § 577 of the Code. The declaration under our system is correct when it contains “a clear statement of the cause of action, in concise and ordinary language.” This was contained in the petition on which the prohibition proceedings are founded. If a declaration had been filed, it would have been but a repetition of the facts stated in the petition, and such filing was unnecessary for the development of the facts, and unnecessary,

also, to prevent the determination of the case in a summary way on a mere motion, which seems to be the object for requiring it to be filed in England. In a similar case the Court of Appeals of Virginia, in *Supervisors of Culpeper v. Gorrell*, 20 Gratt. 484, 523 *et seq.*, decided that a declaration would not be required in a case originating in that court. This shows that the right to demand a declaration is not absolute, as in England, where it was given in order to secure the party a right of appeal. Some ground must be shown for the demand. Some right of the party making it must be alleged, which a declaration would subserve or protect. This was not done in this case. The defendants might have pleaded to or answered the petition, as was done in the case from Virginia, above cited, and as was recognized to be correct in *Donovan v. Mayor*, *ubi supra*, by the High Court of Errors and Appeals of this State. The demand, as shown in this record, was based upon a supposed absolute right to have a declaration, not upon a necessity for it in order to the proper determination of the case. If a sufficient reason was given to the court for a declaration, it is not disclosed by the record. In the absence of such a showing, we are bound to hold that the action of the court in refusing the demand was correct. Moreover, it has been shown that the only office of the declaration, under our system, is to determine a disputed question of fact, which ought to be settled before the writ of prohibition is ordered to issue. With this single office of the declaration, not only the fact to be settled should have been suggested to the court before the judgment ordering the issuance of the absolute writ, but the hearing of the motion for the declaration, based on such suggestion, should have been insisted on before the rendition of such judgment. But in this case the defendants, if they did not agree, at least did not object to the trying of the motion, which asks for a final writ of prohibition, without first insisting on the trial of their motion for a declaration. This was a waiver of that motion, since it is wholly unwarrantable after the rendition of judgment to try an issue as to the existence of a fact on which the judgment is based. The settlement of the facts should precede, not follow, the judgment.

*Judgment affirmed.*

## AMOS WOODRUFF v. TOWN OF OKOLONA.

1. MUNICIPAL BONDS. *Variance from statute. Day of payment.*  
Under a statute authorizing a municipality to issue bonds in aid of a railroad, payable not later than ten years from the date of issuance, bonds made payable twenty years from their date are void.
2. SAME. *Purchaser for value. Recitals. Want of power.*  
Recital in the bonds of conformity to the statute is not conclusive in favor of a purchaser for value, but he must look to the statute, and is chargeable with notice of any want of power to issue the specific bonds.

ERROR to the Circuit Court of Chickasaw County.

Hon. J. A. GREEN, Judge.

A demurrer of the town of Okolona was sustained to a declaration by the plaintiff in error in debt upon certain coupons detached from bonds, issued by the town in pursuance of "An Act to aid in the construction of the Grenada, Houston and Eastern Railroad," approved Feb. 10, 1860 (Acts 1859-60, p. 412), and an amendatory act of March 25, 1871 (Acts 1871, p. 180).

*Lamar, Mayes & Branham*, for the plaintiff in error.

The recital in the bonds that they were issued in pursuance of the acts of 1860 and 1871 is conclusive in favor of a *bona fide* holder, as a buyer was not bound to look further on that point. *Supervisors v. Galbraith*, 99 U. S. 214. In that case, as in this, the variance would have been apparent from the face of the statute. Where the bonds are issued in excess of the amount authorized by the statute, it is no defence against a *bona fide* holder. *Marcy v. Oswego*, 92 U. S. 637; *Wilson v. Salamanca*, 99 U. S., 499. *A fortiori*, it is no defence, where the time of payment merely is extended. In *Commissioners v. Clark*, 94 U. S. 278, and *Township v. Strong*, 96 U. S. 271, where the bonds were made payable at a later date than that fixed by the statute, the objection was overruled, the provision as to date of maturity being considered directory and not of the essence of the power. The latter case was further complicated by the fact that the coupons were made payable semi-annually, instead of annually. The last va-

riance was also passed on in *Cutler v. Madison Co.*, 56 Miss. 115. Thus, by authority, the excess of time for payment would not invalidate the bonds in the hands of a *bona fide* purchaser, nor ought it to do so by reason, for the longer time given in which to pay is favorable to the town, and not prejudicial. The utmost that the town can properly claim is that, in so far as the power was exceeded, the contract is not binding; that is to say, that the coupons for the last ten years of the period are not collectible.

*Houston & Reynolds*, for the defendant in error.

The right to issue these bonds not being inherent in the town, but the result of an enabling statute, the legislature, in authorizing their issuance, had the right to prescribe their character as to amount, interest and time of payment; and the power thus delegated to the town, like delegated powers generally, must be strictly pursued. For reasons satisfactory to the legislature a positive prohibition is contained in the act, forbidding the issuance of bonds to run over ten years. As well can it be said that to charge a double interest is a benefit to the tax-payers, as that it is advantageous to them to pay interest for twice the prescribed time. The bonds payable within ten years are void, because the series of bonds constitute a scheme for a specific purpose, for which a fixed sum is directed to be issued. To half-pay a stock subscription, leaving the other half due from the town, is no compliance with the statute. The policy of funding the entire debt for ten years is not carried out, and the semi-compliance with the law leaves all the bonds void.

*Buchanan & Houston*, on the same side.

The case of *Supervisors v. Galbraith*, 99 U. S. 214, is not conclusive on this court. *Shelton v. Hamilton*, 23 Miss. 496. The plaintiff in error was on the face of the bonds referred to the act, and notice of its requirements was thereby fixed on him. He is conclusively presumed to know the law. The bonds could not be issued, except as authorized by the statute, which restricts the time of payment to ten years. The prohibition is so clear as to leave no room for construction. *Hawkins v. Carroll County*, 50 Miss. 735. The obvious intent of the statute, however, is to encourage immigration, and entail

no debt on posterity. This has been the policy of the State, and the law was framed in accordance therewith.

CAMPBELL, J., delivered the opinion of the court.

We decide this case on the first cause assigned in support of the demurrer, and decline to consider any other question. This cause is, that the coupons were annexed to bonds that were illegal and void, because the law authorizing the town to issue bonds provided for their being made payable at a time "*not to extend beyond ten years from the date of issuance,*" and that the bonds were made payable *twenty* years from their date of issuance. The effect of sections 4 and 5 of the act authorizing bonds to be issued by the town of Okolona was to limit the time when the bonds should be made payable to a period not to exceed ten years, and bonds made payable twenty years after the date of their issuance were unauthorized, illegal and void, for want of authority to issue them. Counsel for the plaintiff in error cited *Commissioners v. Clark*, 94 U. S. 278, and *Township v. Strong*, 96 U. S. 271, as deciding that bonds may be made payable at a later date than that prescribed by the law authorizing their issuance, and that this is not a valid objection to their obligatory force. Neither case sustains this view or gives any countenance to it. Both give countenance to the contrary view, for in both the validity of the objection is assumed, and it is disposed of by establishing the fact that the bonds were not made payable at a longer period than was authorized by the law under which they were issued.

But it is claimed that the bonds contain a recital that they were issued in pursuance of law, and that this is conclusive, and a buyer was not bound to look further, and, although there may be a variance between the bonds and the law under which they were issued, in any respect, it makes no difference, because of the conclusiveness of the statements in the bonds; and the case of *Supervisors v. Galbraith*, 99 U. S. 214, is referred to as holding this doctrine. The claim of counsel seems to be justified by the language of the opinion in that case, but it is not the law, and is not sustained by the cases referred to as authorizing the declaration made. The case of *Commissioners of Knox County v. Aspinwall*, 21 How. 539,

expressly declares that, "the act, in pursuance of which the bonds were issued, is a public statute of a State, and it is undoubtedly true that any person dealing in them is chargeable with a knowledge of it." This case is referred to approvingly in *Moran v. Commissioners of Miami County*, 2 Black, 722, and has been often cited as the leading case on the subject to which it relates. The doctrine it announced, and which is understood to be generally recognized, is, that purchasers of bonds issued by counties and towns or other like organizations are not bound to look beyond the face of the bonds for evidence of a compliance with the conditions annexed to the grant of power to issue them, but the announcement that "the recital in the bonds of conformity to the statutes is also conclusive," as to the power conferred by the statute, was never made, so far as we know, until the case of *Supervisors v. Galbraith*, cited above. We are unwilling to adopt it as the law. We hold that any person dealing in such bonds is bound to look to the public statute of the State which confers power to issue them, and is chargeable with notice of any want of power to issue the very bonds issued. It will not do to say that, because power is conferred to issue bonds of certain designated terms, bonds materially variant from those designated by the law will be good in the hands of a purchaser, because they recite that they were issued in conformity to the statute. That would be to substitute the false recital of the bonds for the provisions of the law to which all must look, and with notice of which a purchaser is chargeable.

It will hardly be contended that a false recital in bonds, that they were issued in pursuance of an act of the legislature, referred to by its title and date of approval, will supply the want of such act, and that a purchaser of such bonds would not have to look further, but could rely on the recitals as conclusive on the county or town whose servants committed the wrong. It will be admitted that the statute conferring authority to issue bonds must exist and must be looked to for the power. It follows that the power exercised must be contained in the statute. A power to issue bonds payable not later than ten years after date does not authorize the issuance of bonds having twenty years to run. Time of payment is

material. An alteration of the time of payment of an instrument is material, and avoids it. It is not allowable to say that the statutory requirement in this particular is only directory, and that the defect is one of form and not of substance. That is to trifle with a solemn legislative provision by judicial assumption. The provision that bonds may be issued payable not later than ten years was material, relating to a matter of substance, and could not be disregarded. The town of Okolona had no authority to issue bonds having twenty years to run. Purchasers of the bonds, charged with knowledge of the statute, knew that it conferred no power to issue such bonds. The recital of the bonds could not mislead them, for they were bound to know their falsity. As to all matters of fact, constituting the conditions for the exercise of the power conferred to issue bonds, purchasers might rely on the recitals of the bonds, but as to the terms of the act conferring the power, they were bound to look to the act itself, and not to any misrepresentation or misinterpretation of it contained in the recitals of the bonds. They are to be read as if the act authorizing their issuance was embodied in them, and any material variance from the act makes them void.

*Judgment affirmed.*

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RICHARD F. ABBEY v. GEORGE W. OWENS, ADMINISTRATOR.

1. LIMITATION OF ACTIONS. *Mutual and open current account.*

Cash payments upon an open account will not create a mutual and open current account within Code 1871, § 2164, which provides, as to the Statute of Limitations, that the cause of action, for the balance due shall be deemed to have accrued at the time of the true date of the last item proved.

2. SAME. *Nature of the cross-demand. Personal property.*

A sale or delivery of personal property, by the debtor to the creditor not intended or accepted as a payment upon the account, gives the debtor a right of action for the price, and constitutes the mutual and open current account contemplated by the statute. *Penniman v. Rotch*, 3 Met. 216, cited.



3. SAME. *Date of mutual dealings.*

It must be shown that, upon both sides of the account, there are items of indebtedness which accrued within the period of limitation, and if the dealings are on one side only within that period, the statute does not apply. *Gulick v. Princeton Turnpike Co.*, 14 N. J. 545, cited.

4. SAME. *Item barred at date of cross-demand.*

The cross-demand will not revive liability for items barred at the date of its origin, but will draw to the last item of the mutual account such items only as were not then barred.

ERROR to the Circuit Court of Tunica County.

Hon. SAM POWEL, Judge.

*Greer & Adams*, for the plaintiff in error.

To bring a case within the exception in the Statute of Limitations, there must be mutual accounts and reciprocal demands. *Coster v. Murray*, 5 Johns. Ch. 522; *Spring v. Gray*, 6 Peters, 151; *Inglis v. Haigh*, 8 M. & W. 769; *Blair v. Drew*, 6 N. H. 235; *Ingram v. Sherard*, 17 Serg. & R. 347. In Angell on Lim. 164, it is stated that there must be mutual, or, as it has been expressed, an alternate course of dealing. When payments on account are made by one party, for which credit is given by the other, it is an account without reciprocity and only upon one side. *Davis v. Tiernan*, 2 How. 786; *Fox v. Fisk*, 6 How. 328.

*Calvin Perkins*, for the defendant in error.

The account is a mutual and open current account within the meaning of Code 1871, § 2164. The Massachusetts statute upon this subject (Rev. Sts. of Mass. c. 120, § 5) is substantially the same as ours. In *Penniman v. Rotch*, 3 Met. 216, that statute is construed. The account in that case, as in the case at bar, consisted of a number of items of debit, extending over a considerable length of time, with only two items of credit, and those two made the account mutual. In *Porter v. Spencer*, 2 John. Ch. 169, in defining a mutual account, Chancellor Kent said that "there must be a series of transactions on one side and of payments on the other;" and in *Davis v. Smith*, 4 Greenl. 337, the court cited the instance of payments as well as the furnishing of merchandise. The principle lying at the foundation of the exception is, that each article of merchandise furnished by a person owing an account is a tacit admission of the account.

CHALMERS, J., delivered the opinion of the court.

Much of the account sued on is barred by the three years' Statute of Limitations, unless the older items are kept alive by the fact that the later ones were less than three years old at the institution of the suit, and that there existed mutual and open current accounts between the parties. The plaintiff's account consisted of divers items, extending through a period of a year or more, and aggregating several hundred dollars. Upon it the defendant was credited with several cash payments and also with credits of \$7.90 for wood furnished, of \$10 for digging or boring a well, and of \$6.16 for iron piping furnished about the well. Did the credits have the effect of establishing mutual open accounts current between the parties, so that the cause of action, in the language of the statute (Code 1871, § 2164), is to be "deemed to have accrued at the time of the true date of the last item proved?"

So far as the cash payments are concerned, they may be left out of view, since the authorities agree that they will not have the effect of creating mutual accounts between the parties; but it is otherwise with reference to personal property sold or delivered by the defendant to the plaintiff. Where there has been such sale or delivery, unless it is shown to have been intended and accepted as a payment upon the account, a right of action accrues on behalf of the defendant for the price, and this constitutes the mutual accounts contemplated by the statute. Our statute is almost a copy of that of Massachusetts on this subject; and in *Penniman v. Rotch*, 3 Met. 216, it was held that the delivery of a single article of merchandise by the defendant sufficed to establish the mutual dealings, so as to draw to the last and unbarred item of the plaintiff's account the whole of the preceding, and otherwise barred, items.

This decision has been generally followed elsewhere; some of the authorities laying down a qualification, which we approve, to the effect that it will not suffice, if upon one side only there have been dealings within the period of limitation, but that it must be shown that, upon both sides, there are items of indebtedness which accrued within such period. When this is the case, the statute will apply, and the accounts will be held respectively to have accrued at the date of their last

items. *Gulick v. Princeton Turnpike Co.*, 14 N. J. 545; *Norton v. Larco*, 30 Cal. 126; *Davis v. Smith*, 4 Greenl. 337; *Wood v. Barney*, 2 Vt. 369; *Sickles v. Mather*, 20 Wend. 72; *Pridgen v. Hill*, 12 Texas, 374; *Finney v. Brant*, 19 Mo. 42. To the limitation upon the doctrine above noted, we add the further one that the mutual dealing will not have the effect of reviving liability as to items fully barred at and before the date of such dealing. In other words, the cross-demand, upon the part of defendant, will operate to draw to the last item of the mutual accounts such items only as were not barred at the date of the origin of the cross-demand.

The case at bar falls within one of the limitations noted above, but not within the other; that is to say, none of the items of the plaintiff's account were barred at the date of the delivery of the articles furnished by the defendant; but such delivery was not within three years of the institution of this suit. In *Gulick v. Princeton Turnpike Co.*, *ubi supra*, it was well said that "there must be mutual dealings and reciprocal demands within the six years" (three years here). "It is not sufficient that there are items on both sides of the account; there must be items within the six (three) years on both sides. Otherwise the dealings for the last six (three) years have not been mutual, but on one side only. The charge made by the defendants, in 1819, is evidence, according to the artificial reasoning which has prevailed on this subject, that there then was an open and unsettled account between the parties, but it is not now evidence that the account, up to that period, still remains open and unsettled. So long as the defendants continued to make charges, so long they admitted an open account; but when they ceased to make charges, the account ceased to be a mutual one." Inasmuch, therefore, as there were no mutual items, that is to say, items on both sides, within three years of the institution of this suit, it follows that there were not mutual open accounts current between the parties, and that the plaintiff was entitled to judgment only for those items of the account which accrued within said period.

*Judgment reversed, and cause remanded.*

J. S. HOSKINS v. A. H. BRANTLEY, DISTRICT ATTORNEY,  
EX REL. J. J. BAKER.

1. OFFICE. *Eligibility. Defalcation.*

The State Constitution, art. 4, § 16, which disqualifies for office persons liable for public money unaccounted for, applies to private citizens as well as to public officers.

2. SAME. *Sheriff. New election.*

If, at an election for sheriff, the candidate who receives the greatest number of votes, is ineligible, the incumbent should hold until the board of supervisors orders an election and his successor is qualified.

APPEAL from the decision of Hon. WILLIAM COTHRAN, Judge of the Fifth District of Mississippi, on a proceeding by *quo warranto*, at the relation of J. J. Baker, awarding the office of sheriff of Holmes County to the relator.

*H. S. Allen, G. A. Wilson and Hooker & Groce* for the appellant.

1. The *quo warranto* statute of Jan. 1, 1874 (Acts 1873-4, p. 22) which confers upon the circuit judge, in vacation, the power to try all questions of fact, is in violation of the State Constitution, art. 1, § 12, and art. 6, § 14. High on Ext. Legal Remedies, §§ 741, 747. In the event of a reversal, to what tribunal is the case remanded? The proceeding would die an unnatural death in the Supreme Court, for the powers of the circuit judge in vacation cease with his final decision.

2. Under the State Constitution, art. 4, § 16, Baker was disqualified. The case of *Brady v. Howe*, 50 Miss. 607, determines that liability for public money renders a person ineligible for public office. The provisions apply not only to public officers, but to all persons who have public moneys unaccounted for. There is but one way in which he can relieve himself of this disqualification; to wit, by accounting for, and paying over, the sums for which he is liable. The legislature had not the power to compromise this liability so as to relieve from the constitutional penalty. But, if it had, the compromise in this case did not cover the entire liability. Under the provisions of the State Constitution, the present

incumbent must hold the office until his successor is elected and qualified. Such are the results of the various constitutional provisions when construed in the light of the principles announced in the following authorities: Sedg. Stat. & Const. Law, 179, 193, 194, 196, 298, 309, 316; *Hogan v. Devlin*, 2 Daly, 184; *Paulina v. United States*, 7 Cranch, 52; High on Ext. Legal Remedies, §§ 643, 710; Dwarris on Statutes, 143, 145, 146; *Pradat v. Ramsey*, 47 Miss. 24; *Peck v. Weddell*, 17 Ohio St. 271; *Brady v. Howe*, 50 Miss. 607; Acts 1876, p. 8, § 2; *Commonwealth v. Garrigues*, 28 Penn. St. 9; *Commonwealth v. Baxter*, 35 Penn. St. 263; *Commonwealth v. Leech*, 44 Penn. St. 332; *O'Docherty v. Archer*, 9 Texas, 295; *Grier v. Shackelford*, 3 Brev. (S. C.) 491; *State v. Deliesseline*, 1 McCord, 52; *State v. Cockrell*, 2 Rich. 6; *State v. Tomlinson*, 20 Kansas, 692; *State v. Stewart*, 26 Ohio St. 216; *Garrard v. Gallagher*, 11 Nev. 382; *Baxter v. Brooks*, 29 Ark. 173.

*H. S. Hooker* and *H. S. Allen*, on the same side, argued orally.

*J. E. Gwin*, for the appellee, argued orally and in writing.

1. The liability which disqualifies under the Constitution must be one directly to the State from an officer. *Brady v. Howe*, 50 Miss. 607. Baker's liability was to his principal, and not to the State. The entire liability has been compromised, and the sum agreed upon has been paid, and a receipt in full given. The constitutionality of the statutes under which the settlement was made is unquestioned.

2. The statute under which this proceeding was instituted is not unconstitutional. It has been held that, where the Constitution gives the Supreme Court the right to try a writ of this character, a trial by jury cannot be demanded. *State v. Johnson*, 26 Ark. 281. In proceedings by *habeas corpus* and forcible entry and unlawful detainer, jury trials are unknown, and motions against sheriffs are tried by the court. *Lewis v. Garrett*, 5 How. 434; *Peck v. Critchlow*, 7 How. 243. An office is not property, and an officer does not hold by contract. *Hyde v. State*, 52 Miss. 665. It is a public trust in which all the people are more interested than the trustee. It would be almost impracticable to obtain an unbiased and impartial jury. *Ewing v. Filley*, 43 Penn. St. 384. The diffi-

culty, as to remanding the case, is met by the practice in proceedings of a similar character.

CHALMERS, J., delivered the opinion of the court.

J. J. Baker, claiming to have been elected to the office of sheriff of Holmes County at the late general election, brings this writ of *quo warranto* against J. S. Hoskins, who, as former sheriff of the county, is holding over under the Constitution of the State until his legally elected successor shall have qualified. One of the pleas filed by Hoskins to the information in *quo warranto* alleged that Baker was "liable for public moneys unaccounted for," and was, therefore, under the provisions of § 16 of art. 4 of the Constitution, disqualified from holding any office of profit or trust in this State. It appears from the agreed state of facts that, some years ago, Baker acted as deputy of one Loverin, at that time sheriff of the county, under a contract with the latter, by which he divested himself of the functions of the office and devolved the same upon Baker, stipulating that the latter should discharge all its duties and receive all its emoluments unmolested by him. While thus acting, Baker collected many thousands of dollars of State and county taxes which he failed to pay over, and for which suits were brought against Loverin and his sureties, of whom Baker was one. Under the authority of a special act of the legislature, these suits were compromised, and the amounts agreed by the proper officers to be received in full satisfaction were paid over by the sureties. The act authorizing a compromise of the sum due the State extended only to the amount then in suit; and the receipt executed by the district attorney, though broader in its terms, must be limited to that amount. Acts 1877, p. 89. It is now shown, by the agreed statement of facts, that Baker then owed, and still owes, the further sum of two thousand dollars for moneys collected upon liquor licenses and privilege taxes, which was unknown at the time of the compromise, and of course was not embraced in the suit. Does this fact render him ineligible to office?

The section of the Constitution, cited above, is in these words: "No person liable for public moneys unaccounted for, shall be eligible to a seat in either house of the legislature, or

to any office of profit or trust, until he shall have accounted for, and paid over all sums for which he may have been liable." The obvious purpose of this provision is to secure payment of all public moneys wrongfully in the hands of any person, and to effect this purpose by rendering such person ineligible to any office until such moneys shall have been paid over. It is not confined in its terms to public officers, though doubtless intended, primarily, to apply to them. The expression is, "No person liable for public moneys unaccounted for," and it embraces, therefore, both in letter and spirit, all who have in any manner become the recipients and holders of any portions of the public revenue, since it is as wrongful in a private person to retain public moneys which may have incidentally come into his hands, as it would be in a public officer; and it is as important to the State to recover such money in the one case as in the other. Indeed, in one point of view, there would seem to be a greater necessity for applying the provision to private persons than to public officers, since the interests of the public are protected by the bonds of the one, while the others have given no such security.

We make this remark because, while we think that the relator falls within the constitutional provision, we place his ineligibility not upon the ground that he was a deputy of the sheriff or a surety upon his official bond, but because it is admitted that he himself collected and still retains a portion of the public moneys. As deputy, he would be in no manner responsible for the acts of his principal, with which he had no connection. As surety on the sheriff's official bond he is answerable, not for public moneys held by himself, but for his principal's default. There must be some element of personal default, some right in the State to demand of him the payment of its revenue, which he has wrongfully appropriated to his own use. Wherever this is the case, the ineligibility will attach, regardless of the manner in which, or the person by whom, the money is retained. Can there be any doubt that the relator is liable to the State for this money? It is admitted that he got it, and that he has not paid it. The fact that the State may ignore the private contract between himself and Loverin, and hold the latter and his sureties liable, does not

acquit the relator of the liability resting upon him, by virtue of the fact that he actually has the money. It is simply a case of the liability of two persons, in which a judgment may be had against both to be satisfied and discharged by a payment by either. If the money had been stolen, the sheriff and his sureties would have been liable, and so also would the thief; but the latter, if thereafter elected to office, could not, while confessing that he held the public revenue, claim to be eligible to office because other persons were equally liable with himself for its payment. Our opinion is that the relator is ineligible to any office of profit or trust so long as he remains liable for public moneys. The judgment of the lower court is therefore reversed, and the information dismissed.

It being conceded that the relator obtained a majority of the legal votes returned and counted at the election, and he being disqualified to claim the office to which he was elected, the appellant, Hoskins, remains in office under his election and qualification in 1877, until his successor is elected and qualified, and to the end that the people may elect such successor, it is the duty of the board of supervisors at once to order an election for sheriff of the county. *Sublett v. Bedwell*, 47 Miss. 266.

*Judgment reversed and information dismissed.*

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MICHAEL McLAUGHLIN v. MARY SPENGLER.

**LIMITATION OF ACTIONS. *Coverture.***

The Statute of Limitations, by virtue of Code 1871, § 2156, does not run against a married woman, to whom a note is indorsed, after a new promise to her by the maker, notwithstanding her rights and remedies under other sections of the Code.

**APPEAL from the Chancery Court of Hinds County.**

Hon. E. G. PEYTON, Chancellor.

The appellant gave his promissory note, secured by mortgage, to one Smith, by whose indorsement it subsequently passed to the appellee, who was then and is now a married



woman, and to whom the appellant indorsed upon the note a new promise. The defence of the Statute of Limitations to the foreclosure bill was disallowed upon the ground of the appellee's coverture.

*Nugent & McWillie*, for the appellant.

The Code 1871, in § 1783, and other sections, by conferring on married women full power to sue, and other rights, does away with the disability of coverture, and, in effect, repeals § 2156 of the Code. The Statute of Limitations, therefore, runs against them. *Brown v. Cousens*, 51 Maine, 301; *Ball v. Bullard*, 52 Barb. 141; *Ong v. Sumner*, 1 Cin. 424.

*Shelton & Shelton*, for the appellee.

The remedy is not barred, but is within Code 1871, § 2156, which is not repealed by other parts of the Code. Repeals by implication are not favored. It must be plain before the courts will hold that an absolute statutory enactment is so abrogated. *Smith v. Vicksburg*, 54 Miss. 615; *Gibbons v. Brittenum*, 56 Miss. 232.

CAMPBELL, J., delivered the opinion of the court.

The new promise was made to Mrs. Spengler, a married woman at the time of the promise, and who continued such, and was a married woman at the time of exhibiting her bill. The Statute of Limitations did not run against her after the new promise. This is the express provision of Code 1871, § 2156, and we are not authorized to disregard it or explain it away, however decided may be the conviction that, with the investiture of married women with all the rights of property and remedies possessed by persons *sui juris*, they should not have been included among those saved from the bar of the statute for the limitation of actions. We have examined the cases cited by counsel from the reports of decisions in other States on this subject, but feel bound by the unmistakable statutory declaration that persons under coverture shall not be subject to the operation of the Statute of Limitations. This is part of the code of statutes which confers rights and remedies on married women, and can no more be ignored or set aside than can that part of the Code which declares their rights and remedies.

*Decree affirmed.*

## B. A. DUNCAN v. B. F. ROBERTSON.

1. MARRIED WOMAN. *Judgment against. Sale thereunder.*

If the record in a suit against a married woman fails to show that she has separate property, or the circumstances which bind it, a sale, under a judgment *nū dicū*, passes no title to her land.

2. SAME. *Purchaser at sale. Bill to prevent cloud.*

Her husband, who purchases at such sale, cannot maintain a bill to enjoin a sale under another judgment against his wife upon the ground that it is void.

3. CHANCERY PRACTICE. *Remitting parties to legal remedies.*

If the validity of the judgment sought to be enjoined is doubtful, the bill should be dismissed without prejudice to the legal rights of the parties.

## APPEAL from the Chancery Court of Clay County.

Hon. L. BRAME, Chancellor, did not preside in this case, but GEORGE A. EVANS acted as Chancellor *pro hac vice*.

*White & Bradshaw*, for the appellant.

The appellee's judgment against the married woman is void, and the sale thereunder would cast a cloud on the appellant's title. Code 1871, § 1783; *Hardin v. Phelan*, 41 Miss. 112; *Whitworth v. Carter*, 43 Miss. 61; *Pollen v. James*, 45 Miss. 129; *Choppin v. Harmon*, 46 Miss. 804; *Bank of Louisiana v. Williams*, 46 Miss. 618; *Cary v. Dixon*, 51 Miss. 593; *Griffin v. Ragan*, 52 Miss. 78; *Travis v. Willis*, 55 Miss. 557. The appellant shows that he is and has been in possession of the land for a number of years; that he has paid the judgment creditor of Mrs. Duncan; that she has acquiesced in the payment; and that she, as well as her creditors, is now estopped to assert the invalidity of Sykes's judgment. *Shivers v. Simmons*, 54 Miss. 520. The bill is maintainable. *Money v. Jorden*, 11 Eng. L. & Eq. 182. Courts will protect a copyright when there is color of title, founded on long possession. Hilliard on Injunctions, p. 392, art. 6; 2 Story Eq. Jur. § 935. The appellant's title is sufficient. *Norton v. Beaver*, 5 Ohio, 178; *Christie v. Hale*, 46 Ill. 117; High on Injunctions, § 269; *Key City Gas Light Co. v. Munsell*, 19 Iowa, 305; Hilliard on Injunctions, 550; 2 Story Eq. Jur., § 953;

*Dyer v. Armstrong*, 5 Ind. 437; *Watson v. Sutherland*, 5 Wall. 74; *Herman on Executions*, § 399; *Gates v. Watson*, 54 Mo. 585; *Bennett v. McFadden*, 61 Ill. 834.

*Fred Beall*, for the appellee.

There can be no doubt that Sykes's judgment is void as to Mrs. Duncan. *Hardin v. Phelan*, 41 Miss. 112; *Dunbar v. Meyer*, 43 Miss. 679; *Choppin v. Harmon*, 46 Miss. 804; *Bank of Louisiana v. Williams*, 46 Miss. 618; *Griffin v. Ragan*, 52 Miss. 78; *Willis v. Gattman*, 53 Miss. 721. The judgment of Robertson against Mrs. Duncan is good in form and substance. *Maclin v. Bloom*, 54 Miss. 365. The Chancellor's decision, remitting the parties to their remedies at law, is proper, even if the latter judgment is invalid.

CHALMERS, J., delivered the opinion of the court.

Mr. Duncan filed his bill, to enjoin the sale of a tract of land under an execution emanating from a judgment against his wife in favor of Robertson, the defendant. He alleged that the land belonged to him, and not to his wife, and that the judgment against the wife was void, but that a sale and conveyance of the land under it would cast a cloud upon his title. The proof developed the fact that his own title was void. The land originally belonged to the wife, and the husband derived title through an execution sale, based upon a judgment recovered against the wife by one Sykes. In the suit which culminated in this judgment, Mrs. Duncan, though shown by the pleadings to be a married woman, was proceeded against in all respects as if a *feme sole*, or person *sui juris*. There were no allegations of the ownership by her of separate property, or of the exceptional circumstances which make the contracts of a *feme covert* binding upon her separate estate. The judgment was by *nil dicit*. Under the well-settled doctrines of this court, a sale under such a judgment does not pass the title of the property of a married woman. *Griffin v. Ragan*, 52 Miss. 78; *Magruder v. Buck*, 56 Miss. 814.

The complainant therefore is shown to have no title; and, as he who invokes the aid of a court of chancery to remove or to prevent the creation of a cloud upon title must show a perfect legal or equitable title in himself, the complainant's bill

was properly dismissed. As there was some doubt as to the validity of the judgment against the wife held by Robertson, a sale under which was by this bill sought to be enjoined, the Chancellor dismissed the complainant's bill without prejudice to the legal rights of either party, leaving them to test hereafter in a court of law the strength of their respective titles if a sale shall be had under Robertson's judgment. We approve and affirm this decree. *So ordered.*

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### BRANDT SMITH v. THE STATE.

1. **INDICTMENT.** *Burglary. Assault and battery. Joining offences.*

A charge for an assault and battery committed in a house which is broken and entered may be joined in the count for burglary without rendering the indictment double.

2. **CRIMINAL PROCEDURE.** *Challenges of jurors. Joint trial.*

If several persons are jointly tried for felony, each is entitled to four peremptory challenges; and, if all are restricted to four, a conviction of a misdemeanor will be set aside. Code 1871, § 2761.

ERROR to the Circuit Court of Lincoln County.

Hon. J. B. CHRISMAN, Judge.

*R. H. Thompson*, for the appellant.

The indictment, which is double, should have been quashed. Each of the defendants was entitled to four peremptory challenges. Code 1871, § 2761: Proffatt on Jury Trials, § 164; 2 Hale P. C. 267, 268; 1 Chitty Crim. Law, 536; *United States v. Marchant*, 12 Wheat. 480; 3 Wharton's Crim. Law (6th ed.), § 3195; *State v. Earle*, 24 La. Ann. 38.

*T. C. Catchings*, Attorney General, for the State.

If prisoners are tried jointly without objection on their part, each is not allowed his full number of challenges. They should object to a joint trial, and apply for a severance, and, if it is refused, each will be entitled to the full number. Proffatt on Jury Trials, § 164. As they were convicted only of a misdemeanor, the question is to be determined without reference to the common law, which only allowed challenges in cases of felony. The indictment is in accordance with the precedents.

GEORGE, C. J., delivered the opinion of the court.

The plaintiff in error was, jointly with several others, indicted for burglariously breaking and entering the house of one Mark Newman, with intent to commit the crime of assault and battery upon said Mark Newman, Nash Deall and Miles King, then and there being; and the indictment also charges that the defendants then and there beat and wounded the three persons before named. A motion was made to quash the indictment upon the ground that it charged two distinct offences — burglary, and assault and battery — in the same count. We do not regard the objection as good. Larceny is held to be properly charged in a count for burglary, upon the ground, as was settled in *Roberts v. State*, 55 Miss. 421, “that whether the breaking into the house be burglary or not depends upon the intent; and the act of larceny after the breaking is conclusive proof of the intent with which the breaking was done. The larceny therefore is charged, not as a substantive offence, but as demonstrating the burglarious intent.” The same reasoning applies to the case above.

It is next assigned for error that the court refused to allow each of the prisoners who were on trial four peremptory challenges, holding that all of them together were entitled only to four. At common law prisoners were allowed peremptory challenges in trials for felonies only; but it seems to be well settled that, in such trials, in case several defendants are jointly tried, each is entitled to the full number of challenges, as if he had been tried separately. 3 Wharton Crim. Law, § 3194; *United States v. Marchant*, 12 Wheat. 480; 2 Hale P. C. 268. Our statute, Code 1871, § 2761, allows four peremptory challenges in trials for misdemeanors, and felonies not capital. The language is, “In all cases not capital, the accused should be allowed four peremptory challenges and the State two.” A well recognized rule is, that in construing statutes changing the common law, the latter shall not be considered as altered farther than the plain provisions of the statute require. So far, therefore, as felonies are concerned, we are obliged to hold that no other charge was made, as to peremptory challenges, than reducing their number from thirty-five to four. Regarding this as a trial for felony, though the defendants were acquitted

of the burglary and convicted only of a misdemeanor, as we think we must, it results that the ruling of the court was wrong.

*Judgment reversed and new trial awarded.*

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EX PARTE MICHAEL HIGGINS.

COUNTY CONTRACTORS. *Removal of convict out of county.*

Under the act to reduce judiciary expenses (Acts 1878, p. 164), prisoners can be removed out of the county in which they were convicted by the contractor of an adjoining county.

APPEAL from the decision of Hon. UPTON M. YOUNG, Judge of the Eleventh District of Mississippi, dismissing a writ of *habeas corpus*, and remanding the relator to the custody of the contractor.

*A. W. Brien and R. V. Booth*, for the appellant.

Under the statute (Acts 1878, p. 164), the contractor for Hinds County has no right to take the convict out of Warren County, where he was tried. The sheriff and president of the board of supervisors of each county are, by the statute, inspectors of the prisoners convicted therein, who cannot be moved about over the State.

*No counsel, contra.*

CHALMERS, J., delivered the opinion of the court.

The eleventh section of an act to reduce the judiciary expenses of this State (Acts 1878, pp. 164, 169) provides that where no one will contract with the board of supervisors of a county, for the labor of the prisoners confined in the county jail, the board may contract with the contractor of any adjoining county. This gives the right to such contractor of the adjoining county to remove the prisoners to the county where his first contract was made, and where his stockades have been built and his work is in progress. It is not incumbent on him to work the prisoners of each county within the limits of the county where they were convicted.

*Affirmed.*

## R. L. DUNN ET AL., EXECUTORS v. E. H. KELLY.

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1. AGRICULTURAL LIEN LAW. *Purchaser of products. Notice of lien.*  
Under the agricultural lien law a landlord can maintain an action against a purchaser with notice of cotton subject to a lien for rent. Acts 1876, p. 109. CAMPBELL, J., dissented.
2. SAME. *Suit against purchaser. Effect of absence of notice.*  
*Quære*, Can the action be maintained if the purchaser had no notice.

ERROR to the Circuit Court of Yazoo County.

Hon. S. S. CALHOON, Judge.

The plaintiffs in error sued the defendant in error for damages sustained by the purchase by the latter of cotton, upon which in right of the testator the former had a lien for rent under the agricultural lien law, and the circuit judge to whom the case was submitted decided for the defendant.

*J. C. Prewett*, for the plaintiffs in error.

This case differs from *Wooten v. Gwin*, 56 Miss. 422, in the fact that here the purchase was with notice. *Cooper v. Baker*, 54 Miss. 637. The opinion of Chalmers, J., in *Wooten v. Gwin*, *ubi supra*, announces the better rule.

*Hudson & Hudson*, for the defendant in error.

The true rule is announced by Campbell, J., in *Wooten v. Gwin*, 56 Miss. 422. This lien is not superior to that of a judgment. *Dozier v. Lewis*, 27 Miss. 679; *Cloud v. State*, 53 Miss. 662. If, however, the action is maintainable, no recovery is proper in this case.

GEORGE, C. J., delivered the opinion of the court.

In *Wooten v. Gwin*, 56 Miss. 422, the three judges of this court differed as to the true construction of the agricultural lien law (Acts 1876, p. 109), so far as relates to the liability of parties buying or receiving a part of the crop on which the landlord had a lien for his rent. Chalmers, J., thought a purchaser of the crop was liable for its value, whether he had notice or not of the lien. Simrall, C. J., thought the liability did not exist unless the purchaser had notice; and Campbell, J., denied that any remedy existed except that pointed out in the statute, which could only be made effectual by a seizure of the

crop. In this case it is shown by the evidence that the purchaser had notice, or, what is the same thing, had reasonable ground to believe that the landlord's lien for rent was unpaid when he purchased the cotton. He admits he knew that the landlord had a lien at one time on the cotton. Knowing this, he was bound to see before he purchased it that the lien had been discharged. Under the opinion of the majority of the judges in the above case, he was liable. Whether I should concur with Simrall, C. J., in restricting the purchaser's liability to a case where he had notice, or with Chalmers, J., need not be stated until the case arises in which the expression of an opinion may be necessary.

*Judgment reversed and a new trial granted.*

CAMPBELL, J. I dissent from the conclusion of the majority, for the reasons stated in my opinion in the case referred to in the foregoing opinion.

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N. W. WARD ET AL. v. A. J. SCOTT.

1. SUPREME COURT. *Jurisdiction. Amount in controversy.*

Under Code 1871, § 1834, the Supreme Court has no jurisdiction of a writ of error in a case where the Circuit Court on appeal from a justice of the peace renders judgment against the defendant for less than fifty dollars, although the plaintiff recovered a larger judgment before the magistrate.

2. SAME. *Costs.*

Costs are not to be estimated in determining the question of jurisdiction.

MOTION to dismiss a writ of error to the Circuit Court of Tate County for want of jurisdiction.

The justice of the peace, before whom an action of trover for sixty-nine dollars damages for the conversion of a bale of cotton was brought, rendered judgment for sixty-four dollars against the defendants, N. W. Ward and others, who appealed to the Circuit Court, where a judgment for thirty-eight dollars damages and twenty dollars costs was rendered against them.



*Nugent & McWillie*, for the motion.

Under Code 1871, § 1334, this court has no jurisdiction. The amount now in controversy is that of the judgment of the Circuit Court, to which the writ of error is taken by the defendants, exclusive of costs. *New Orleans Railroad v. Evans*, 49 Miss. 785; *Jackson v. Whitfield*, 51 Miss. 202.

*Shands & Johnson*, contra.

The statute refers to the amount in controversy in the Justice's Court. *Champanois v. Fort*, 45 Miss. 355; *Prewett v. Nash*, 50 Miss. 584. The costs make the Circuit Court judgment exceed fifty dollars. *Planters' Bank v. Coulson*, 6 How. 395.

CAMPBELL, J., delivered the opinion of the court.

The amount in controversy in this case does not exceed fifty dollars. The judgment of the Circuit Court which is sought to be reversed is for less than that sum. The error complained of is, not that a sum greater than fifty dollars was claimed in the suit, but that the judgment rendered is erroneous. The matter complained of is the subject of controversy, and that is the judgment, and its amount is less than fifty dollars. The judgment could have been paid and extinguished by an amount less than fifty dollars. Where that is the case no writ of error lies to the judgment of a Circuit Court in a case appealed from the judgment of a justice of the peace. Code 1871, § 1334. Costs are not to be estimated, because they are not of the amount in controversy, but are only an incident to the controversy.

*Motion sustained.*

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W. J. ELLZEY ET AL. v. THE STATE.

CONSPIRACY. *Object. Civil wrong.*

A general creditor, who procures the assignment of a deed of trust which his debtor has given on his exempt personalty, and substitutes a trustee, who refuses to receive payment, sells the property, and produces a balance which the creditor garnishes, is with his accomplice guilty of conspiracy, if they acted in concert under an agreement to accomplish the result.

ERROR to the Circuit Court of Lincoln County.

Hon. J. B. CHRISMAN, Judge, did not sit in this case, but Hon. S. S. CALHOON presided by interchange.

*J. F. Sessions*, for the plaintiffs in error.

The property was obtained by lawful means for a lawful purpose. The trustee did only his duty, and the creditor had a right to purchase the trust deed and to garnish the fund.

*T. C. Catchings*, Attorney General, for the State.

The purpose was to subject exempt property to a debt for which it was not liable. That was unlawful, and the fact that legal means were used to effect the illegal object does not relieve the confederacy of its criminal character.

GEORGE, C. J., delivered the opinion of the court.

The plaintiffs in error were indicted for a conspiracy to cheat and defraud one Humphreys of certain personal property. The evidence fully justified the verdict of guilty. It was shown that Humphreys had given a deed of trust to Milsaps on a horse, three head of cattle and his crop of corn and cotton, the former amounting to about eighty bushels and the latter to about two bales. On this deed a balance of thirty dollars and seventy cents was due and unpaid. Norton, or his wife, had a debt due from Humphreys for one hundred and four dollars, being the balance of four hundred dollars due on the purchase of a tract of land by Humphreys. In October, 1876, Norton procured an assignment of the deed of trust of Milsaps, on the false representation to Milsaps that Humphreys was about to run off or dispose of the property conveyed in the deed. As soon as he got the assignment, the original trustee resigned and Ellzey, under a provision in the deed, was substituted as trustee by Norton. As soon as Ellzey was substituted he demanded payment of the above balance from Humphreys. The latter did not have the money, but offered to turn over more than a sufficiency of cotton embraced in the deed to pay it. Ellzey refused to accept this; but seized the cotton and the corn of Humphreys, his only horse, and made a constructive seizure of the cattle running in the woods, and advertised all the property for sale. A few days before the sale an offer was made by Mrs. Humphreys to pay the money, which Ellzey

declined to receive upon the ground that a writ of garnishment was expected by him to be served on him at the instance of Norton. Ellzey made the sale, which produced fifty-four dollars more than the debt and costs of sale, and, in answer to Norton's garnishment, which was issued on a judgment rendered after the above offer to pay, acknowledged that he owed Humphreys that much. Norton also sold the land, under the deed of trust, and bought it. The result of all these proceedings was, that Norton got his land back after three hundred dollars of the four hundred dollars purchase-money had been paid; sold out Humphreys' personalty, and thereby produced fifty-four dollars more than was due on the deed of trust assigned to him by Milsaps, and applied this sum also to the land debt. All the personalty sold under the deed of trust to Milsaps was exempt property, except the cotton.

By these machinations the personal exempt property of Humphreys, not at all necessary to pay the debt secured in the deed of trust, was sold under it in order to raise a fund in the hands of the trustee, for which he could be garnished by Norton, and which could thus be applied to the payment of the debt to him. This cannot be permitted. It was a civil wrong to Humphreys and unlawful. A conspiracy is defined to be a confederacy of two or more persons to accomplish some unlawful purpose, or a lawful purpose by unlawful means. What is unlawful is not necessarily criminal. "It is enough," said Cockburn, C. J., in *Regina v. Warburton*, L. R. 1 C. C. 274, "if the acts agreed to be done, although not criminal, are wrongful, i. e., amount to a civil wrong." Both the end sought to be attained here,—the application of the exempt property to Humphreys' debts; and the means,—the selling of more property under the deed of trust than was necessary to pay the debt secured by it, in order to produce a surplus for the garnishment process,—were unlawful. The circumstances clearly show that the plaintiffs in error acted in concert and under an agreement to bring about the result above condemned.

*Judgment affirmed.*

## JOHN CAIN v. THOMAS KELLY.

1. VENDOR AND VENDEE. *Statute of Frauds. Deceit.*

The vendee of land under a parol agreement can recover only for loss directly incurred by reason of the vendor's fraud, and upon a state of case which would sustain an action for deceit as described in *Sims v. Eiland*, ante, 607.

2. SAME. *Parol contract for sale of land. Measure of damages.*

He cannot recover for losses sustained by any thing which occurs between himself and the vendor after he hears of the latter's unwillingness to reduce the contract to writing because of doubt as to his right to sell the land.

APPEAL from the Circuit Court of Carroll County.

Hon. W. COTHRAN, Judge.

In this action of trespass on the case for damages sustained by fraud and deceit practised by the appellant in refusing to execute a parol sale of land to the appellee, the former pleaded not guilty. The appellant was, as the appellee knew, when they made the contract, trustee under a will devising the land, and on Dec. 31, 1878, shortly afterwards, he notified the appellee that he doubted his power, when the question was by agreement referred to an attorney, who decided that the trustee had no power to sell. The plaintiff, who had entered upon and improved the land and put laborers and stock thereon before Dec. 31, 1878, made some expenditures afterwards, and by the verdict recovered for all.

*T. H. Somerville* and *Monroe McClurg*, for the appellant.

The case of *Welch v. Lawson*, 32 Miss. 170, should be restricted to the state of facts there involved. The vendor is not liable if he acted in good faith. *Baldwin v. Munn*, 2 Wend. 399. As no part of the purchase-money was paid, the recovery should be nominal. *Conger v. Weaver*, 20 N. Y. 140. The damages were excessive, for after Dec. 31, 1878, the plaintiff should have made no more expenditures. *Vicksburg Railroad v. Ragsdale*, 46 Miss. 458; *New Orleans Railroad v. Echols*, 54 Miss. 264.

*J. B. H. Hemingway*, on the same side, argued orally and in writing.

The plaintiff's damages should have been limited to such as necessarily resulted from the breach of the contract, and to expenses incurred before the breach. *Paine v. Sherwood*, 19 Minn. 315; *Freeman v. Morey*, 41 Maine, 588; *Hamilton v. McPherson*, 28 N. Y. 72; *Pounsett v. Fuller*, 17 C. B. 660; *New Orleans Railroad v. Echols*, 54 Miss. 264. As the defendant believed that he had title and acted in good faith, the plaintiff cannot recover beyond his actual expenses. Recovery for a breach of contract, where there is no fraud, must be confined to such damages as were within the contemplation of the contracting parties. *Paine v. Sherwood*, 19 Minn. 315; *Devlin v. Mayor*, 63 N. Y. 8.

*Nugent & McWillie*, for the appellee.

The facts show a clear case of fraud and deceit, and establish more than is necessary in order for the plaintiff to recover. *Clopton v. Cozart*, 13 S. & M. 363; *Welch v. Lawson*, 32 Miss. 170. Although the defendant testifies to a good defence, yet the conflict of evidence has been settled against him by the verdict. The damages are not excessive, but are the actual loss sustained by the plaintiff on account of the defendant's deceit. He was following out the rule announced in *New Orleans Railroad v. Echols*, 54 Miss. 264, by making the most he could out of the wreck caused by the defendant.

*T. A. McWillie*, on the same side, made an oral argument.

CAMPBELL, J., delivered the opinion of the court.

In *Welch v. Lawson*, 32 Miss. 170, the action was maintained because of the bad faith or fraudulent conduct of the seller who refused, without just cause, to consummate the parol contract. The utmost limit of the doctrine is that a person who has failed to obtain what his parol agreement induced him to expect shall be entitled to recover for any loss directly incurred by the fraud of the party dealt with. The case must be such as to sustain an action for *deceit*, for the rules applicable to which reference is made to the opinion in *Sims v. Eiland*, ante, 607. In this case the damages are greatly in excess of any legal claim of the plaintiff. He is not entitled to recover any thing for losses incurred by him, by reason of any thing occurring between him and the defendant after Dec. 31, when

he learned of the unwillingness of the defendant to reduce the contract to writing because of doubt as to his right to sell the land. He is entitled to recover only for what occurred prior to that and for deceit practised by the defendant, if he shall establish it.

*Judgment reversed and cause remanded.*

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MARY E. SMOKEY v. CHARLES P. WACK ET AL.

1. ATTACHMENT. *Claimant's issue. Form of tendering.*

Under Code 1871, §§ 858, 859, 860, where goods seized under attachment are claimed by a third person, the plaintiff's averment that, at the date of the seizure they were the property of the defendant and subject to the attachment, is a sufficient tendering of issue upon the claim.

2. SAME. *Surplusage in tender of issue.*

Averments in the plaintiff's tender of issue that the property at the date of the seizure did not belong to the claimant, who was not and is not the owner thereof, are useless, but do not vitiate the proper averment.

ERROR to the Circuit Court of Adams County.

Hon. RALPH NORTH, Judge, did not sit in this case, but Hon. J. B. CHRISMAN presided by interchange.

After property had been seized under an attachment against J. J. Smokey, sued out by the defendants in error, the plaintiff in error made the claimant's oath and bond under Code 1871, §§ 858, 859, 860. At the return term, the plaintiffs filed a tender of issue on the claim, in which they alleged that the property at the date of the seizure did not belong to the claimant, who was not and is not the owner thereof, but that, at such date, the goods were the property of J. J. Smokey and subject to the attachment. The claimant's motion, at a subsequent term, for the release of the goods, because by the default of the plaintiffs in attachment no issue for the trial of the right of property had been made up, was overruled, and the case was submitted to the court upon the facts, and judgment was rendered against the claimant.

*R. E. Conner* and *T. O. Baker*, for the plaintiff in error.

The issue tendered by the plaintiffs in attachment was improper. It should have been like a declaration in detinue. Code 1871, §§ 858, 861, 862; *Phillips v. Cooper*, 50 Miss. 722; *Atkinson v. Foxworth*, 53 Miss. 741. The paper filed is a mere traverse of the claimant's affidavit.

*Frank Johnston*, on the same side.

In this class of cases there is a correct mode of pleading. The plaintiffs in attachment, on whom the burden of proof rested, should have tendered the issue. Treating the affidavit of the claimant as the declaration is improper. The averments of the paper filed by the plaintiffs present several issues, and omit the only proper one.

*M. Green*, for the defendants in error.

The issue tendered was technically correct, and is not vitiated by the surplusage which precedes it. Nothing in *Phillips v. Cooper*, 50 Miss. 722, justifies the position that a declaration is necessary. On the contrary, the court intimate that no pleading is required.

*Fred. Parsons* and *W. T. Hewitt*, on the same side, filed a brief which the reporter has been unable to obtain.

CAMPBELL, J., delivered the opinion of the court.

The averment of the plaintiffs below that, at the date of the seizure of the goods by virtue of the writ of attachment, they were the property of the defendant therein and subject to the attachment, was a sufficient tendering of an issue to comply with the statute, Code 1871, §§ 858, 859, 860. All that precedes this averment is useless verbiage, and might have been expunged with advantage, but it did not vitiate the proper and only proper averment, viz., that title was in the defendant.

*Judgment affirmed.*

57	584
70	922

## E. P. GORDON ET AL. v. M. MCEACHIN, EXECUTOR.

1. WITNESS. *Competency. Estates of deceased persons.*

On the trial of exceptions to a final account, creditors of the testator are competent witnesses, under Code 1871, § 758, and the amendment, (Acts 1878, p. 190), as to the propriety of the executor's action in paying their demands, which were not probated.

2. SAME. *Executor. Claim existing in lifetime of testator.*

The executor is not a competent witness, in such a proceeding, to establish his claim against the estate, if it existed in the testator's lifetime.

3. SAME. *Assignment of claim.*

The object of the amendment of 1878 is to prevent the original claimant from testifying to establish a claim against the estate in a suit by a person to whom he has assigned it after the testator's death in order to be a witness as it was shown he could do in *Rothschild v. Hatch*, 54 Miss. 554.

APPEAL from the Chancery Court of Lafayette County.

Hon. A. B. FLY, Chancellor.

On the trial of the exceptions filed by the appellants to the appellee's final account as executor of William Gordon's will, the executor was examined in his own behalf touching certain items representing debts due to him from Gordon in the lifetime of the latter, and also as to the other items of the account, and several creditors of Gordon, whose claims had not been registered, but had been paid by the executor, were examined as to the propriety of such payments. Exceptions to these depositions were overruled.

*Phipps & Burney*, for the appellants.

The depositions of the creditors and the executor were inadmissible. This case differs from that of *Barry v. Sturdivant*, 58 Miss. 490. In that case the burden of proof was upon the legatees, in this the creditors' claims had never been probated, and the burden was on the executor. So far as that case modified *Haralson v. White*, 38 Miss. 178, it is erroneous, and the construction of Code 1871, § 758, is *obiter dictum*. The result in the case of *Barry v. Sturdivant* has been modified by Acts of 1878, p. 190, and the case is practically overruled by *Jones v. Sherman*, 56 Miss. 559;



*McCutchen v. Rice*, 56 Miss. 455, and *Love v. Stone*, 56 Miss. 449.

*R. J. Guthrie*, on the same side.

The depositions of the creditors are not competent evidence for the executor; their interest is not remote, but, unless they establish their claims, they will be compelled to refund him the money which he has paid them. The executor was testifying to establish his own claim, which originated in the lifetime of the testator. His deposition was, therefore, clearly incompetent; and, as it is impossible to tell what effect his evidence may have had, the case must necessarily be reversed and remanded.

*Lamar, Mayes & Branham*, for the appellee.

The objection which applies to all of McEachin's deposition must be sustained or overruled *in toto*. His testimony went to establish the transactions since the testator's death, and his payment since the death of the testator of claims held by third parties against him in his lifetime. Both phases of his testimony are authorized. Code 1871, § 758; *Barry v. Sturdivant*, 53 Miss. 490. The testimony of the creditors was competent. They were not parties, but had been paid before the beginning of this controversy, and, if liable at all, they were so only on a remote contingency. *Faler v. Jordan*, 44 Miss. 283; *Hedges v. Aydelott*, 46 Miss. 99; *Wood v. Stafford*, 50 Miss. 370; *Stadeker v. Jones*, 52 Miss. 729; *Love v. Stone*, 56 Miss. 449.

CAMPBELL, J., delivered the opinion of the court.

The creditors of the testator in his lifetime, whose demands had been paid by the executor without their having been probated, allowed and registered, as provided for by law, were competent witnesses for the executor to testify to the propriety of his disbursement in paying such demands. They are not excluded by § 758 of the Code, or by the amendment of that section by the Act of 1878 (Acts 1878, p. 190). Their *ex parte* affidavits would have secured the precedent allowance of their claims, which would have justified their voluntary payment by the executor; and, *a fortiori*, should the testimony of the creditors as witnesses, subjected to cross-examination by the

legatees, be held to be admissible as to the propriety of the payment of their claims by the executor. To exclude a witness, under the statutes cited, he must be seeking to establish his own claim against the estate of a deceased person, or one he has assigned since the death of the decedent, in a suit between himself and another, in which the estate of the decedent or some part of it is involved. *Love v. Stone*, 56 Miss. 449. The object of the amendment of 1878 referred to was to prevent the evil of a transfer of a claim, after the death of the decedent, and, in a suit by the transferee, the proving it by the original claimant, who had assigned for the purpose of being made thereby a competent witness, as it was shown by the decision in *Rothschild v. Hatch*, 54 Miss. 554, might be done. So much of the testimony of the executor as related to his claim against the estate of the testator existing in the lifetime of the decedent was incompetent and should have been excluded. It is impossible to determine what influence this testimony had on the Chancellor, and, for the error in admitting it, the decree will be

*Reversed.*

87	896
70	159
57	835
73	144
57	836
73	395

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### THOMAS L. MORROW v. THE STATE.

1. **HOMICIDE.** *Witnesses. State's duty to introduce.*

The prosecution in a case of homicide is not bound to introduce all the witnesses of the killing who are marked as State's witnesses and present at the trial.

2. **SAME.** *Exception to rule. Presumption of law.*

*Semle* that the prosecution cannot, by introducing a witness to the fact of killing alone, force the accused to introduce State's witnesses to rebut the presumption of murder.

**ERROR** to the Circuit Court of Washington County.

Hon. B. F. TRIMBLE, Judge.

*W. P. Harris* and *W. B. Pittman*, for the plaintiff in error, each argued orally and in writing.

As the witnesses saw the homicide, the prosecutor was bound to call them. *Rex v. Simmonds*, 1 Car. & P. 84; *Regina*

v. *Holden*, 8 Car. & P. 606; Roscoe Crim. Evid. 185; *Regina v. Chapman*, 8 Car. & P. 558; *Regina v. Stroner*, 1 Car. & K. 650. American courts of high repute hold the same doctrine. *Maher v. People*, 10 Mich. 212; *Hurd v. People*, 25 Mich. 405. The case of *State v. Martin*, 2 Ired. 101, is merely to the effect, that after the prosecutor has fully developed all the facts, where there are a great number of witnesses, he is not bound to introduce cumulative testimony. In the case at bar, however, the facts were not all proved; but, by selecting the strongest witnesses against the accused, the prosecutor forced him to introduce State's witnesses.

*T. C. Catchings*, Attorney General, for the State, filed a brief, and argued the case orally.

The witnesses had been examined, and their previous testimony on file in court showed their strong bias in favor of the accused. Their relations to him were such as to make them improper witnesses for the State. Old English cases cited by opposing counsel are based upon a practice and course of procedure different from that in our courts. The Michigan cases are unsound, and are inapplicable to the state of facts in the case at bar. Judge Ruffin, in *State v. Martin*, 2 Ired. 101, properly held that the doctrine contended for by opposing counsel is unsupported by reason or practice. He declared that the prosecutor has the right to examine such witnesses as he chooses; and that it is his province, not the court's, to determine who shall be the State's witnesses.

CHALMERS, J., delivered the opinion of the court.

Thomas L. Morrow was convicted of the murder of Thomas J. White, and sentenced to confinement in the penitentiary for life. He prosecutes this writ of error to reverse that judgment. The principal ground of reversal urged is that the district attorney in the court below having closed the case for the State without examining two witnesses whose names were marked as State's witnesses on the back of the indictment, and who were present at the trial, the accused by his counsel moved the court to compel their introduction and examination by the State, upon the ground that the testimony already delivered showed that they were present at the kill-

ing, and under such circumstances it was the duty of the prosecution to put them upon the stand. This motion being denied, exception was duly taken.

There are several English cases decided at *nisi prius* which lay down the doctrine with more or less distinctness, that it is incumbent upon the Crown in a prosecution for a homicide to produce every attainable witness who was present at the killing. *Regina v. Holden*, 8 Carr. & P. 606; *Regina v. Chapman*, 8 Car. & P. 558; *Regina v. Stroner*, 1 Car. & K. 650; Roscoe Crim. Evid. 185. The doctrine seems to have met the approval of the Supreme Court of Michigan in two cases; though, when analyzed, these are rather adjudications that it is not permissible for the prosecution to present an isolated part of the *res gestæ* without a full development of all that occurred, than a declaration that it must examine all the witnesses who were present at the transaction. *Maher v. People*, 10 Mich. 212; *Hurd v. People*, 25 Mich. 405. The doctrine is utterly repudiated and denied by the Supreme Court of North Carolina, which, through one of its most eminent members, Judge Ruffin, declared that it had neither principle nor practice in that State to support it, and that "it was the province of the solicitor, and not of the court, to determine who should be the State's witnesses." *State v. Martin*, 2 Ired. 101, 120. We find no other adjudications on the subject, and no allusion to the doctrine in any American textbook. We are not prepared to go to the length of the Supreme Court of North Carolina in holding that the court would have the right under no circumstances to compel the production by the State of the testimony of the eye-witnesses of the homicide. If the prosecuting officer should content himself with proving the bare fact of killing by one who had witnessed that act only, resting his case upon the legal presumption of guilt thereby implied, and if it was made evident by the testimony produced that there were other witnesses present who saw the whole transaction, it would, we think, be always within the sound discretion of the court to compel their production by the State, if in attendance or easily attainable.

Whether a refusal to exercise such discretion could ever be ground of reversal, we will not decide, except to say that it

could only be so where it was made to appear that actual injustice had been done to and injury sustained by the accused, as where he had been compelled by such imperfect presentation of the facts, and by the legal presumptions thereby raised, to produce as his own a witness with strong bias against him, whose testimony militated against the general theory of his defence. When such a case is presented, we shall be in a better situation definitely to settle the point. No such case is before us. The principal witness whom it was demanded that the district attorney should produce was the step-daughter of the prisoner's brother, and the other was her husband. They lived at the date of the homicide with the accused, and had so lived for many years. They had twice testified in the case, and their written testimony was then in court. It constituted, if believed by the jury, a perfect defence to the charge; and to have compelled the district attorney to have produced them as State's witnesses, and to have vouched for the truth of their statements, would have been almost equivalent to compelling him to enter a *nolle prosequi*. As soon as the motion was overruled, they were introduced by the defendant, and most exhaustively examined and cross-examined. We do not think that the district attorney should have been compelled to make them his witnesses, nor do we see how any legal injury was sustained by the defendant by the action of the court.

*Judgment affirmed.*

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J. M. TRICE v. ALFRED LAGRONE.

1. OBSTRUCTION TO WATERCOURSE. *Remedy. When applicable.*

The thirty-fourth chapter of the Code of 1871 refers to obstructions to watercourses, erected by persons who have mills, gins and other machinery; and the summary remedy authorized by § 1935 is not applicable to levees and ditches on farms and residences.

2. SAME. *Embankment not for machinery. Judgment of removal. Injunction.*

A person injured by a levee and ditch of the latter description must seek redress in the ordinary courts; and, if he obtains the judgment of the special tribunal organized under Code 1871, § 1935, to remove the obstruction, a court of chancery will enjoin its execution.

APPEAL from the Chancery Court of Monroe County.

Hon. L. HAUGHTON, Chancellor.

The respondent appealed from a decree overruling his motion to dissolve an injunction upon bill, answer and evidence.

*Murphy, Sykes & Bristow*, for the appellant.

The result of the former controversy between these parties is an adjudication of the matter here involved ; but if it was *res integra*, Trice's right is clear under Code 1871, § 1935. The title of the statute, which may be resorted to in construing it, shows that other obstructions are as much within its scope as "mills and dams." Sedgw. on Stat. and Const. Law, 40 ; *United States v. Fisher*, 2 Cranch, 358 ; *Burgett v. Burgett*, 1 Ham. 469. If by § 1935 it was meant only to provide a summary remedy for the mischief occasioned by the obstructions mentioned in the eight preceding sections, the same language would be used. But it is much broader and materially different. Potter's Dwarria, 198. The legislature never meant to interfere so summarily with a dam erected to run a mill or cotton-gin, and to provide no special remedy for the wanton obstruction of a stream by a fish trap, to the ruin of another's lands. By reference to § 1938, it will be seen that the proceeding under § 1935 does not bar any private action or public prosecution, and that the action for damages, and the special proceeding under § 1935, are concurrent. Hence it is plain that, wherever a private action can be maintained for obstructing a watercourse so as to overflow and damage another's lands, this special remedy may be also had. The authorities cited by counsel—*Thompson v. Moore*, 2 Allen, 350, and *Washburn on Easements*, 404—are directly in our favor.

*Houston & Reynolds*, for the appellee.

If the levee and ditch are not "in or over any watercourse" but are constructed for the purpose of drainage, and thereby the appellant's land is overflowed, they cannot be abated in the summary manner provided in Code 1871, § 1935. The scope of the chapter was to encourage the erection of machinery useful to the public, and to provide a remedy for lands injured by overflow from dams built for this purpose. The section was not intended to give a remedy for every obstruction of a

watercourse. Its language is, "any person, not being authorized, as hereinbefore provided." That is, if any person shall erect any dam which is legalized in the preceding sections, without the authority therein provided, he may be proceeded against under § 1985. The appellee, under the chapter, could not obtain authority to erect the levee, of which the appellant complains, and is therefore not amenable to the provisions of the section. This construction is supported by the following authorities: *Thompson v. Moore*, 2 Allen, 350; Washburn on Easements, 404.

CHALMERS, J., delivered the opinion of the court.

Alfred Lagrone and another dug a ditch and erected an embankment on their own land, the effect of which was to so dam up the water of a small stream which flowed through their estate and that of their neighbor, J. M. Trice, as to submerge the lands of the latter. Trice therefore instituted proceedings under Code 1871, § 1985 to have the embankment cut; and the three householders who, under the provisions of the section cited, were summoned for the purpose, adjudged that it should be cut. From this adjudication Lagrone and the other appealed, — first to the Circuit Court and then to this court; but the appeal was dismissed by both courts, upon the ground that the statute contemplated no appeal but made the judgment of the householders final. *Lagrone v. Trice, ante*, 227. Lagrone now files this bill to enjoin the enforcement of that judgment on the ground that the whole proceeding was a nullity, because such obstructions to watercourses as are here complained of are not within the purview of § 1985. His position is that the statute has reference to obstructions to watercourses created by persons who are erecting mills, gins or other machinery, and who in so doing fail to comply with the requirements of chapter 84 of the Code, of which § 1985 is a part; and that, inasmuch as it is to such obstructions only that the summary provisions of these sections apply, those who are aggrieved by any other obstructions are left to their common-law and equity remedies. We think that this is the true construction of the statute. All the preceding sections of the statute look to the establishment

on watercourses of mills and other machinery, and regulate the manner in which the persons erecting them shall obtain authority to obstruct the flow of water. Sect. 1935 then declares that "if any person, not being authorized, as hereinbefore provided [that is, in the manner pointed out by the preceding sections], shall make or erect any embankment, levee, dam, or other obstruction, in or over any watercourse," parties aggrieved thereby may have the summary remedy given for the removal of such obstructions. It seems difficult to escape the conclusion that the language applies only to those who, intending to erect the obstructions contemplated in the previous sections, have, by reason of omission to observe their requirements, failed to obtain the authority which those sections confer. It is true that in all the other sections no other obstructions than dams or mill-dams are referred to, and that in this section embankments, levees, dams, or other obstructions are embraced; but, while the class of obstructions is broadened, the class of persons erecting them remains the same. The declaration is, that if those erecting the mills, "not being authorized, as hereinbefore provided, shall make or erect any embankment, levee, dam, or other obstruction," persons injured shall have the remedy provided by the section. While no other obstructions than dams are spoken of in the sections which treat of obtaining authority to erect them, the prohibition in this section applies to all obstructions, but has reference, nevertheless, to such as are created by the unauthorized erection of mills. While the language used is broad enough to embrace any and all obstructions, without regard to the person by whom or the purposes for which they are created, we do not think that it is intended to apply to levees and ditches on farms or residences. The proceeding authorized by the statute is harsh and summary. From it there is no appeal. By it there is intrusted to three private persons a most unbounded and dangerous power. We are not disposed to extend it to doubtful cases. The remedy of the appellant, if he has been injured by the obstruction complained of, must be sought in the courts of law or equity, and not before the special tribunal created by § 1935.

*Decree affirmed.*



## WINNIE O. DAVIS ET AL. v. EUGENE WILLIAMS ET AL.

57	848
78	25
78	41

1. DEED. *Delivery. Intention.*

A deed, although executed and acknowledged, is inoperative, if retained by the grantor, who manifests no intention that it shall be considered as delivered.

2. SAME. *Unexecuted purpose to deliver.*

Depositing the instrument in a box containing his other papers in a bank, with a written statement enclosed that it is to be handed to the grantees, is not a delivery, if the maker's intention is to fix a time for the title to vest, and he dies without doing so.

3. WILL. *Requisite formalities.*

A will is invalid unless attested by witnesses or wholly written and subscribed by the maker.

APPEAL from the Chancery Court of Grenada County.

Hon. J. B. MORGAN, Chancellor.

The appellees, grandchildren of Robert Williams filed a bill in chancery, by their next friend, E. P. Williams, to establish a deed of gift of real estate in their favor, which was resisted by the appellants, the maker's children, upon the ground that the instrument was never delivered. On April 1, 1874, Robert Williams signed, sealed and acknowledged the instrument, and inclosing in it a slip containing the statement that he deposited the instrument for safe keeping, and directed it to be handed to his grandchildren, placed it in a box, with his other papers, in the bank of Lake Brothers, where it was found after his death, more than four years later. E. P. Williams, father of the grandchildren, testified that Robert Williams, his father, had handed him the instrument in an envelope, telling him to have it recorded after his death, and that subsequently the witness had returned it to his father, advising him to put it in the bank, and that his father did so, and gave him the key of the box. But, when the box was first opened, the witness, who was present, had failed to mention the key, although it was asked for, and, when required to produce the key in court, he brought a bunch of keys, and was unable to select the right one. None of them would unlock the box. On final hearing, there was a decree establishing the instrument as a deed.

*Fitz Gerald & Whitfield*, for the appellants.

The question is one of intent. In this case the grantor never parted with dominion over the instrument, and had the right to recall it from the depository. *Cook v. Brown*, 34 N. H. 460; *Baker v. Haskell*, 47 N. H. 479; *Johnson v. Farley*, 45 N. H. 505; *Commercial Bank v. Reckless*, 1 Halst. Ch. 430; *Parker v. Dustin*, 2 Foster, 424; *Doe v. Knight*, 5 B. & C. 671; *Baldwin v. Maulsby*, 5 Ired. 505. Retaining authority over the deed shows the delivery to have been incomplete. *Jackson v. Phipps*, 12 Johns. 418; *Jackson v. Dunlap*, 1 Johns. Cas. 114; *Hooper v. Ramsbottom*, 6 Taunt. 12; *Habergham v. Vincent*, 2 Ves. Jr. 204. The test as to whether a deed has been sufficiently delivered is the right of the grantee to have that specific deed put into his possession. *Wall v. Wall*, 30 Miss. 91; *Johnson v. Brooks*, 31 Miss. 17, *Exum v. Cauty*, 34 Miss. 533; *Harkreader v. Clayton*, 56 Miss. 383; *Cocks v. Simmons*, ante, 183. The same doctrine, adopting the same test, is announced in many States, in England, and by the Supreme Court of the United States. *Maynard v. Maynard*, 10 Mass. 456; *Harrison v. Phillips Academy*, 12 Mass. 456; *Brown v. Austen*, 35 Barb. 341; *Fisher v. Hall*, 41 N. Y. 416, and authorities cited; *Merrills v. Swift*, 18 Conn. 257; *Steel v. Miller*, 40 Iowa, 402; *Wiggins v. Lusk*, 12 Ill. 132; *Bell v. Farmers' Bank*, 11 Bush, 34; *Woodbury v. Fisher*, 20 Ind. 387; *Cloud v. Calhoun*, 10 Rich. Eq. 358; *Commercial Bank v. Reckless*, *ubi supra*; *Rushin v. Shields*, 11 Ga. 636; *Rutledge v. Montgomery*, 30 Ga. 899; *Brevard v. Neely*, 2 Sneed, 164; *Prutsman v. Baker*, 30 Wis. 644; *Eckman v. Eckman*, 55 Penn. St. 269; *Duer v. James*, 42 Md. 492; *Bacon's Abr.* 212; *Younge v. Guilbeau*, 3 Wall. 636. Again, the grantee must accept. *M'Gehee v. White*, 31 Miss. 41; *Bullitt v. Taylor*, 34 Miss. 708. Recording is not enough. *Derry Bank v. Webster*, 44 N. H. 268; *Oxnard v. Blake*, 45 Maine, 602; *Jackson v. Richards*, 6 Cowen, 617; *Jackson v. Dunlap*, 1 Johns. Cas. 114. Acceptance will not be presumed merely because it is beneficial to the grantees. *Commonwealth v. Jackson*, 10 Bush, 424. The instrument, which is neither subscribed by witnesses nor written by the maker, is not good as a will. *Cook v. Brown*, 34 N. H. 460.

*R. H. Golladay*, for the appellees.

While as respects the grantor, the question of delivery is one of intent, different considerations apply in the case of the grantee. As to the latter, the inquiry is, how must his acceptance be manifested. Intention is inferable from facts, which are never identical in two cases. A constructive delivery is shown in the case at bar. The purpose was to give effect to the deed. 3 Wash. Real Prop. 257. This appears from the slip enclosed, and is further shown by E. P. Williams's testimony, which is not inconsistent therewith. The fact that this witness had forgotten where he put the key does not destroy his evidence. He shows clearly that the grantor intended a delivery. The most unfavorable view for the appellees which can be taken of the facts, is that the deed was delivered as an escrow, to take effect at the grantor's death. Consideration of all the evidence, which is conflicting, will not enable this court to pronounce the Chancellor's decision erroneous.

CAMPBELL, J., delivered the opinion of the court.

Whether there has been such a delivery of an instrument under the seal of the maker as to make it operative as his deed, is a question of intention on the part of the maker. If he considered it as fully executed and operative, according to its terms, and intended it to have effect from a certain date, that is a sufficient delivery to give it effect. The mere fact that the maker retains the instrument in his own possession and under his own control, if he has once effectually delivered it, does not prevent it from being enforced. But it is because of the effectual delivery of the instrument, whereby it is made the deed of the party, that it is enforced; for delivery is essential to the validity of a deed, as all the cases agree. A careful consideration of the facts disclosed by this record, as to the intent and understanding of Robert Williams with reference to the paper averred by the bill to be his deed, has convinced us that it was *never delivered as such*. It is certain that he had it drawn and signed it, and acknowledged it before a justice of the peace, who certified such acknowledgment; but it is equally certain that he did not then deliver it or

intend that it should then become operative. According to the testimony of E. P. Williams, as to the declaration made by Robert Williams on handing him the package containing the deed, it is manifest that he contemplated the taking effect of the deed mentioned after his death. The separate slip of paper signed by Robert Williams, and placed within the folded paper alleged to be a deed, is without any indication of the purpose of the maker, as to when the instrument should take effect as his deed. If he had designed it to take effect, it was easy to accomplish that design by delivering the instrument. That he did not deliver it, to take effect presently, shows that he did not so desire it. The separate slip did not constitute delivery, and was unnecessary, if delivery was made. It indicates that the making and acknowledging the instrument was precautionary; that the maker then intended to make the disposition of his property indicated by the instrument he subscribed, and that he did not intend it to take effect immediately, but at some time, in the future, when he should see proper, and, therefore, he retained control of the instrument. We take this view, upon the testimony of the witness for complainants to establish delivery of the instrument, in connection with all the facts in the case; but the record discloses such frailty of the memory of that witness, in reference to the key to the bank-box, as justly to lead to distrust of it, as to what was said or done, within his knowledge, by Robert Williams, in reference to the alleged deed, and we feel greater safety in rejecting all the evidence, on both sides, as to what Robert Williams said or did, and in considering the indisputable evidence of his subscribing and acknowledging the alleged deed, and the separate slip declarative of what he did and desired, and his retention of both within his own control for four and a half years after their being made, without any decisive act or declaration in reference to them. If a deed, when did it take effect? If it vested title in the grantees, from what date? Was the legal title in the grantees from April 1, 1874? If not, from what date? It is incredible that Robert Williams intended the title to vest April 1, 1874. It is impossible to determine at what time it was his purpose that it should vest. The witness says he was told to

put the deed on record after Robert Williams should die. The written slip placed with the instrument, and made for the purpose of declaring the intent of the maker, is silent as to this and inconsistent with the testimony of the witness. Our view is that Mr. Williams did not deliver the instrument, and died without the consummation of his scheme with reference to the property embraced in the instrument. There is too much uncertainty as to the intent of the maker, as to the taking effect of the instrument, to enforce it as his deed. He never delivered it. To compel its delivery as his act and deed is to hazard making the act of the court a substitute for his act. In all of the cases we have examined, in which a deed kept in the possession of the maker was enforced, the decrees were based on the ascertained purpose of the grantor that the deed should be effective as such by virtue of its execution. We are unable to find such purpose in the acts and declarations of Robert Williams and are convinced that his intent was that the instrument he subscribed should, at some future period, to be designated by himself, become effective by a delivery he purposed to make. We think it manifest that Mr. Williams did not intend the instrument to be absolute as a deed at the date he made it, and we have been unable to discover that he ever made it absolute. Therefore, it remained a purpose unexecuted and incomplete. The instrument cannot be upheld as a deed for want of delivery. It is not valid as a testamentary act, because it is not attested by witnesses, nor wholly written and subscribed by the maker.

*Decree reversed and bill dismissed.*

## R. V. PEARSON v. L. R. WILSON.

1. **CONTESTED ELECTIONS.** *County office. Appeal. Bond.*

Under the act of March 5, 1878 (Acts 1878, p. 173), no appeal from the special tribunal which tries a contested election for a county office can be taken without an appeal bond for costs; and this is not altered by the statute which provides for *supersedeas*. Acts 1880, p. 125.

2. **SAME.** *Appeal bond. Failure to execute. Amendment.*

The appeal cannot be amended in the Circuit Court by executing the bond required by the former statute in a case where the only bond given was the one for *supersedeas* authorized by the latter.

3. **SAME.** *Justice of the peace. Failure to qualify. Official acts.*

Verdict and judgment, rendered by the special tribunal after the expiration of the justice's official term, bind the contestants, if being re-elected he continues in possession of the office exercising its functions, although his attempt to qualify anew is frustrated.

4. **SAME.** *Special court. Injunction. Reorganization.*

The fact that the contestant and justice of the peace desist from proceeding, in obedience to a void injunction issued by the Chancery Court at suit of the defendant, does not prevent the special tribunal from reassembling after dissolution of the writ, and concluding the case.

5. **SAME.** *Official bond. When given by contestant.*

The requirement that official bonds shall be given within a specified time does not apply to the contestant until the termination of the contest, when, if he has a verdict not appealed from, the proper officers should approve his bond.

**ERROR to the Circuit Court of Yalobusha County.**

**Hon. J. W. C. WATSON, Judge.**

At the general election, on the first Tuesday in November, 1879, the plaintiff in error received a certificate of election to the office of sheriff of Yalobusha County, and during the same month was commissioned. The defendant in error, the opposing candidate, filed a petition, under the act of March 5, 1878 (Acts 1878, p. 173), to contest the election, before J. S. Reasons, a justice of the peace. Summons for Pearson and jury process were issued returnable Nov. 29, 1879. On that day the case was continued by consent, and so, from

time to time, until Dec. 10, 1879, when the justice and Wilson were served with an injunction, issued, under a fiat of Chancellor Fly, from the Chancery Court of the county, on a bill which Pearson had filed. They obeyed the writ, and the special tribunal dispersed. J. S. Reasons, whose term of office expired on the first Monday of January, 1880, was re-elected at the same general election, and, having received his commission for the new term, to begin on that day, presented his bond to a deputy in the office of the chancery clerk, who, owing to the contest for the latter office (*Ex parte Wimberly, ante*, 437), refused to approve the bond, telling him to wait until that contest was decided. On Feb. 16, 1880, Wilson tendered his bonds as sheriff and tax collector to A. T. Wimberly, the chancery clerk, who rejected them upon the ground that they were not in time. After the result in the Wimberly case, the injunction in this case was dissolved, and on Feb. 19, 1880, the special tribunal reassembled, when Pearson pleaded to the jurisdiction, and denied the power of Reasons to resume the subject; but his objections were overruled, and the case proceeded to a verdict for Wilson, on Feb. 28, 1880, and he was soon after commissioned. On Wednesday, March 8, Pearson presented to the justice a petition and affidavit for appeal to the Circuit Court, and a bond, approved by the Chancellor, in the penalty of five hundred dollars, conditioned to pay Wilson all damages which he might sustain by reason of such appeal should the contest be finally decided in his favor. The magistrate refused to approve the bond, but indorsed upon it "This bond filed and appeal prayed for on the 3d day of March, 1880." Wilson, on May 17, 1880, presented a sheriff's bond and tax collector's bond to the chancery clerk and the president of the board of supervisors, and they refused to justify the sureties, upon the ground that the bonds were too late. Both contestants acted as sheriff, Wilson holding the rooms and Pearson the books and papers, and process was executed at either establishment after the first Monday in January, 1880. When the Circuit Court met, in May, 1880, each expressed a willingness to perform his official duties in connection therewith, and Pearson moved to amend his appeal, so as to give an appeal bond in a penalty of three hundred dollars,

conditioned for costs. When the foregoing facts were developed, Pearson's motion was overruled, and the service of the court devolved upon Wilson. Both parties agree that this court, *pro bono publico*, shall settle all the questions in controversy.

*Fitz Gerald & Whitfield*, for the plaintiff in error.

1. The tribunal created by the statute is a special one, unknown to the ordinary judicial system, and must die with the occasion that brought it into being. The justice of the peace presides not by virtue of his functions as such, but only because designated by the statute. When organized, the court has no terms, and cannot continue the case, and its adjournment or dispersion under the injunction destroyed it. It could not be reassembled. *Ex parte Wimberly*, ante, 437. Pearson is not estopped to make this defence. The essential elements are wanting. *Turnipseed v. Hudson*, 50 Miss. 429; *Staton v. Bryant*, 55 Miss. 261; *Sulphine v. Dunbar*, 55 Miss. 255; *Davis v. Bowmar*, 55 Miss. 671; *Dorlarque v. Cress*, 71 Ill. 380; Herman on Estoppel, 223, 245, 291, 334; Bigelow on Estoppel, 488, 467. The injunction was a nullity, and as it imposed no penalties if disregarded, so it conferred no rights if obeyed. Respecting the nullity entitles Wilson to no additional consideration. *Mattox v. Hightshue*, 39 Ind. 95; *Sublett v. Bedwell*, 47 Miss. 267; *Crisler v. Morrison*, ante, 791.

2. Under the Act of March 2, 1880 (Acts 1880, p. 125), the person returned as elected is required to give only one bond on appeal. The intent of the statute is that he shall hold the office until the contest is finally decided. A bond for "damages" includes costs. *Gayden v. Marshall*, 8 S. & M. 489; *Baggett v. Beard*, 43 Miss. 120; *Edwards v. Bodine*, 11 Paige, 223. As the contestant never gets the office until the contest is determined, he is required to give only a cost-bond. If the person in possession is required to give two cost-bonds, the legislature, contrary to its plain intention, is placed in the absurd attitude of requiring an unnecessary thing. Such a construction will never be adopted. *Dixon v. Lacoste*, 1 S. & M. 700; *New Orleans Railroad v. Hemphill*, 35 Miss. 17; *McIntyre v. Ingraham*, 35 Miss. 25. If the cost-bond was



requisite, Pearson should have been allowed to amend by giving it in the Circuit Court. *Green v. Boon*, ante, 617. Under the ruling in *Allen v. Standifer*, ante, 612, the fact that such bond had not been executed earlier does not change the result. An affidavit was made and a bond given within the time, so that the appeal of Pearson, who did every thing in his power, was at most only defective.

8. Wilson is clearly not the sheriff. He has never qualified. Until Feb. 16, 1880, he made no effort to qualify. His first bond was presented more than thirty days after the first Monday in January. Under Code 1871, § 819, if Pearson was not sheriff, the office was vacant. Under the decision in *Vasser v. George*, 47 Miss. 713, Wilson was ineligible, and that goes to the merits of the controversy under the act of 1878. The act of April 19, 1878 (Acts 1878, p. 76), prescribes no new time within which the contestant shall qualify, and if the general provision, requiring all official bonds of county officers to be given within thirty days after the first Monday in January succeeding the election, does not apply, he must be governed by the Code. The bond of Feb. 16, 1880, does not fall within the statute, because at that time Wilson was not a "contestant," and is also inoperative, because it was never approved and the sureties never justified. If the act of 1878 is construed to mean that the contestant shall give bond within thirty days after the termination of the contest, and the appeal was void, the bond of May 17, 1880, was too late, because the verdict on Feb. 28, 1880, was, in that view, an end of the matter.

*W. P. & J. B. Harris*, on the same side.

1. Pearson was returned elected, qualified, was commissioned within the proper time, and entered upon the duties of the office. At that time there was no obstacle to his investiture in accordance with the Constitution and laws, and, if nothing has since occurred to destroy his title, he is now sheriff. It is immaterial how the consequence of obeying the injunction is characterized. It was a voluntary submission to an illegal order of a court having no power to issue it. It has been recently decided by this court that the order was a nullity, and might have been disregarded with impunity. *Ex parte Wimberly*, ante, 437. In that case it

was held that to concede such power to the Chancery Court was to put it out of the power of the special court to perform its appropriate function in the time and manner required by the statute for the object in view; that such were the limitations under which the special court was placed, that to interfere with it by an indefinite postponement tended to subvert the statute and destroy the court. It must have been in the mind of the legislature that the justice's term of office might expire with that of the sheriff. In short the idea of the special tribunal undergoing an eclipse for an indefinite time, — until after the commencement of the political year, — and then emerging to resume motion, seems opposed to any rational notion of the legislative intent. In the case of *Crisler v. Morrison*, ante, 791, these suggestions took the form of a positive judgment that time was, in the matter of the contested election, of the essence of the proceeding; that it confined the action of that tribunal in such a way that it could not go out of the time fixed for its organization, which was twenty-five days from the day of election, and that the act of the justice in postponing the return-day beyond the twenty-five days took away the jurisdiction so completely that the writ of prohibition was applicable. It is impossible to put the loss of jurisdiction in a stronger light. There is no difference between that kind of postponement and a postponement by a continuance to a stated period in the future, and an indefinite postponement. The motive of the justice could not change the effect of his act, and it could make no difference that the postponement was asked by one or both of the parties. The question is one of power in the tribunal over the subject.

2. The doctrine of estoppel cannot be invoked. It would go no further than consent. In a certain class of cases parties have been held to have precluded themselves from assailing the title of an officer. Sureties on a sheriff's or tax collector's bond have not been permitted to question the title of the officer in actions on the bond; and in England it has been held that a corporator, who has concurred in the installation of an officer of the corporation, cannot be a relator in a *quo warranto* proceeding. *Queen v. Greene*, 2 Q. B. 460. In the case

of *Turnipseed v. Hudson*, 50 Miss. 429, the subject was discussed. These cases do not furnish precedents for decision on the question as to the effect of the conduct of parties on the power of a tribunal created by statute to determine a public question committed to it. If we had the case of an agreement between the contesting parties after the initiation of the proceedings, that it might stand over for three months, the justice entering it on his minutes, no court would uphold the proceeding which might take place at the end of that time, if it should appear that, pending this so-called suspension, the certified officer-elect qualified when his term began. The case is not stronger than the one we have. The justice could not of his own will postpone the case until after the term commenced, nor could the consent of parties give to such action any validity. *Green v. Creighton*, 10 S. & M. 159; *Lester v. Harris*, 41 Miss. 668. The mere conduct of parties, as indicating acquiescence, their failure to answer, and the like, can furnish no legal ground for a departure from the statute. *Dorsey v. Barry*, 24 Cal. 449; *Lindsey v. Luckett*, 20 Tex. 516; *Searcy v. Grow*, 15 Cal. 117. The modes pointed out for determining the title to office are in their nature public actions. The contested election is especially a matter of public concern, although it is conducted in the names of the claimants of the office. Whether the proceeding is initiated, as it is here, by a claimant, or whether it shall be open to any elector, as in California and Texas, the proceeding is a public cause. The verdict controls all functionaries, high and low. It is, perhaps, the best example of those judgments, determining facts not thereafter to be disputed by any party in any cause, a public judgment *in rem*, settling a matter for the people at large. It is above contract, consent or estoppel. It has the force of the registrar's certificate unquestioned in the statutory mode.

3. Wilson is not the sheriff for another reason. No construction can be given to the act of 1873 which would authorize him to tender a bond at any time after a verdict in his favor. That act has merely changed the time from which the thirty days is to be computed, and we must compute here from the time at latest that he might qualify. If there

were no appeal, it would run certainly from the expiration of the five days within which an appeal is allowed, or twenty days for the bond conditioned for damages. Giving the longest period, the 17th of May makes it too late. A tender of a bond before the verdict was ineffectual. The effect of holding that there was no appeal is to hold that there was no obstacle to the giving of a bond.

4. It is very clear that, if there was one bond covering both costs and damages, that would suffice to uphold the appeal. Both bonds, if two are required, are payable to the same person, and there does not appear to be any objection to combining the two into one, both being intended to indemnify the same party. Where it is at all doubtful whether the justice approved and the bond appears to be good, it would be a harsh ruling to hold that it did not save the appeal, if delivered and filed.

*A. H. Whitfield* and *W. P. Harris*, on the same side, argued orally.

*Nugent & McWillie*, for the defendant in error.

1. The law on the subject of contested elections contains no provision as to continuances from day to day and the time during which the proceeding is to be determined. Time is of the essence only as to the commencement of the proceeding. In view of the great public importance of the question involved, — whether the voice of the people has been falsely and fraudulently misrepresented, — the legislature has provided that the controversy shall be commenced within twenty days after the election, and that the issue as to who received the greatest number of legal votes cast shall be made up and tried by a jury. Beyond that, the statute is silent. The issue must be determined as speedily as possible. The dominant thought is a trial on the merits, whenever a case is properly commenced. The tribunal must proceed to the end before it can become *functus officio*. It is left to the prudence and good sense of the courts to regulate the rules of practice and course of procedure, each case depending upon its peculiar facts. Acts 1878, p. 173. In the case at bar, the jurisdiction had attached, and could only be exhausted when there was a verdict on the issue joined. Otherwise, the jurisdiction, granted by

law and fairly acquired, to try the case on the special issue of fact may be lost, not because of any provision of the statute violated in the progress of the cause, but because of some illegal act on the part of the contestee. That the controversy is one in which the public is interested intensifies the view. The public is but an aggregation of individuals; and it is conceded that, as to a contest between individuals purely, the rule is as we state.

2. The plaintiff in error cannot take advantage of the plea that the Chancellor was without jurisdiction to grant the injunction. He consummated the wrong; he procured the illegal writ; he deliberately took advantage of it; he had it executed, and stood by it to the end; he affirmed the jurisdiction of the Chancery Court in a sworn bill; and now asks this court to consider it all a sham, a device to trick an adversary. Can this be allowed? The current of authority is against the proposition. The Court of Appeals of Kentucky said that the admission of such a plea would "have more extensive evil consequences than at first blush can be seen," and that it would be unjust and iniquitous to allow it. *Stevenson v. Miller*, 2 Litt. 306; *Hanna v. McKenzie*, 5 B. Mon. 314. The rule is, that a party who improperly commences an action, and derives all the benefit he intends from his suit, cannot avoid the responsibility which he incurs by his misfeasance. *Turner v. Billagram*, 2 Cal. 520; *Flanigan v. Turner*, 1 Black, 491; *Jermain v. Langdon*, 8 Paige, 41; *Giles v. Halbert*, 12 N. Y. 32; *Hawkins v. Hall*, 3 Ired. Eq. 280; *Cohen v. Broughton*, 54 Ga. 296; *Fahnestock v. Gilham*, 77 Ill. 637; *First National Bank v. Warrington*, 40 Iowa, 528; *Willis v. Willis*, 59 Tenn. 183; *Pickett v. Merchants' National Bank*, 32 Ark. 346; *Hooker v. Hubbard*, 102 Mass. 239; *Mariner v. Milwaukee Railroad Co.*, 26 Wis. 84; *Fowler v. Stevens*, 29 La. Ann. 853. Because in a strictly legal, technical sense, the injunction was void, being issued in a cause wherein the Chancellor was without jurisdiction, it is said that obedience to it cannot be pleaded so as to save the tribunal. It was a nullity which should have been treated with contempt. It was a harmless thunderbolt in one sense, but it was the duty of the officers to whom it was addressed to obey it promptly, unhesitatingly

and without restraint. If they disobeyed, they incurred the hazard of a proceeding for contempt, and provoked a profitless and unseemly conflict with the Chancery Court. While they could have disobeyed it with comparative impunity, they should have respected it until dissolved in the usual way. *State v. Weed*, 1 Foster, 262; *Watson v. Watson*, 9 Conn. 140; *Sandford v. Nichols*, 13 Mass. 286; *Davis v. Wilson*, 65 Ill. 525. The *status quo* must be re-established; the delay cannot be imputed to the contestant or the public; the contestee must bear that burden alone. By this course no law is contravened, and no provision of the special statute on this subject violated; the spirit of the law is preserved, and its letter untouched; justice is done, and the popular will respected.

3. No appeal was taken from the verdict of the jury. The act of March 5, 1878 (Acts 1878, p. 173), provides for an appeal to be taken within five days and a trial *de novo* in the Circuit Court, on condition precedent that a bond in the penalty of three hundred dollars be given for the payment of all costs. The execution of this bond in strict conformity with the statute, and its approval by the justice, are the conditions of the appeal, and the things essential to the jurisdiction of the appellate court. *Bowie v. Hagan*, 5 How. 18; *Hardaway v. Biles*, 1 S. & M. 657; *Eustis v. Holmes*, 48 Miss. 34; *Winters v. Clailor*, 54 Miss. 341. The statute of 1878 provides that there shall be no *supersedeas*, but the act of March 2, 1880 (Acts 1880, p. 125), authorizes *supersedeas* in favor of the party returned as elected, if applied for within twenty days from the time of the appeal, upon his giving a bond, in the penalty prescribed by the Chancellor, conditioned to pay the contestant all damages which he may sustain by reason of such appeal should said contest be finally decided in favor of said contestant. This latter bond is to be approved by the Chancellor who fixes the penalty, and manifestly contemplates a case in which an appeal has been perfected according to the provisions of the act of 1878. The bond given by the plaintiff in error was a *supersedeas* bond, and the magistrate properly refused to approve it as an appeal bond. It was not in the penalty prescribed by law, and was not conditioned to pay all costs; it was approved by the Chancellor as a *supersedeas* bond. But

as there was, and had been, no appeal taken, the *supersedeas* bond was inoperative, and the plaintiff in error is idly vexing the court and his opponent with a useless and expensive litigation.

*W. L. Nugent*, on the same side, made an oral argument.

*H. M. Sullivan*, on the same side, argued orally and filed a brief.

1. Obedience to the injunction did not extinguish the jurisdiction of Reasons's court. Pearson, who sued out the writ, is estopped to make that defence, even if it was void. Bigelow on Estoppel, 463, 518, 525. It is not necessary to an equitable estoppel that the party should wilfully intend to mislead, or that the party who claims the estoppel should have acted affirmatively on it. It is sufficient if he has been induced thereby to refrain from such action as lay in his power by which he might have retained his position and saved himself from loss. *Voorhis v. Olmstead*, 66 N. Y. 113. Formerly, the doctrine of estoppel was considered odious, but in this more enlightened age that wholesome doctrine is gaining favor with the courts, and our own Supreme Court, in the case of *Staton v. Bryant*, 55 Miss. 261, said that no precise rule as to what constitutes an estoppel can be prescribed by the courts, but each case must be considered, and the doctrine applied or not, according to its peculiar circumstances. To rule out Wilson in this uncereemonious manner is not to administer substantial justice, to do which, as was said in *Allen v. Standifer*, *ante*, 612, is the tendency of modern and enlightened jurisprudence. But, apart from the estoppel, the court was not precluded from reassembling by obedience to the injunction. The case of *Ex parte Wimberly*, *ante*, 437, does not so hold, but merely mentions the question as one which might arise. *Crisler v. Morrison*, *ante*, 791, is not in point. The cases of *Lindsey v. Luckett*, 20 Tex. 516, and *Dorsey v. Barry*, 24 Cal. 449, were decided under the statutes of those States, and do not bear on the question. Wilson is not chargeable with any negligence, but has made all possible speed. Every presumption should be indulged in favor of jurisdiction. *Townseley v. Sumrall*, 2 Peters, 170; *Philadelphia Railroad Co. v. Stimpson*, 14 Peters, 448; *Cocke v.*

*Halsey*, 16 Peters, 71. Again, the court will not give such an interpretation to a statute as will defeat it, but will construe it, if necessary, even against the letter, to carry out its spirit and object. *Allen v. Standifer*, ante, 612. Yet to allow a litigant to defeat the jurisdiction of the court by force, fraud or stratagem, would defeat the object for which this law was enacted, the public choice would be unascertained, the public interest and private rights lost.

2. The failure of Reasons to give bond and qualify under his new election does not affect his official acts. Code 1871, § 1296, provides that justices of the peace shall hold for the period of two years and until their successors are qualified. But if it be contended that this statute is unconstitutional, in that it undertakes to extend the term of office limited by the Constitution, then we say: Reasons was commissioned; that gave him color of title to the office; he was in the undisputed possession and discharge of its duties and functions. Hence he was a justice of the peace *de facto*, and his acts were as valid as if he were such *de jure*, so far as the public and third persons are concerned. Code 1871, § 317; *Kimball v. Alcorn*, 45 Miss. 151; *Brady v. Howe*, 50 Miss. 607; *Taylor v. State*, 51 Miss. 79; *State v. Cooper*, 53 Miss. 615; *People v. Collins*, 7 Johns. 549; *Fowler v. Bebee*, 9 Mass. 231; *Keyser M'Kissan*, 2 Rawle, 139; *Benjamin v. Armstrong*, 2 S. & R. 392; *Beard v. Cameron*, 3 Murph. 181; *Lyon v. State Bank*, 1 Stew. 442; *Taylor v. Skrine*, 3 Brev. 516; *Plymouth v. Painter*, 17 Conn. 585; 7 Bacon's Abr. 283. Reasons, however, as matter of fact, tendered a good bond to the proper officer, whether that officer was *de jure* or *de facto* chancery clerk.

3. The failure of Wilson to give bond and qualify within thirty days from the first Monday in January, 1880, did not, under the Code of 1871, *ipso facto* vacate the office, and he would remain in office until the board of supervisors declared the office vacant, and before such declaration he could at any time give bond. *State v. Cooper*, 53 Miss. 615; *Harris v. State*, 55 Miss. 50; *James v. State*, 55 Miss. 57. But the act of 1873, p. 76, is conclusive that, in case of a contest, the law requiring official bonds to be given within thirty days from the com-



mencement of their term of office does not apply to contestants. Nevertheless, Wilson executed and tendered a bond to Wimberly, the chancery clerk, on February 16, 1880, which he declined to approve, assigning as the only reason therefor that the bond was not presented in time. Again, on May 17, 1880, a perfect bond, with perfect security, was presented by Wilson to Wimberly and the president of the board of supervisors for approval, and it was not approved for the same reason. All Wilson could do was to make a good bond and tender it. He could not compel, even by mandamus, the approval of it. He could simply compel action. He could not, by mandamus, control the discretion of those officers as to approval or non-approval. Wilson has, therefore, done all that he was legally required to do in this respect, and more.

4. There was no appeal, because Pearson gave no appeal bond. It was not even a defective appeal bond subject to amendment, but the bond given was a *supersedeas* bond. Appeals are allowed by statute; they are not allowed as a matter of constitutional right. To constitute an appeal, the appellant must give bond, with security approved by the court below, and the bond, as well as the security, must be approved by the court, and all the requirements of the statute must be strictly complied with, or the appeal will be void and the appellate court will have no jurisdiction. *Porter v. Grisham*, 3 How. 75; *Hardaway v. Biles*, 1 S. & M. 657; *Winters v. Claitor*, 54 Miss. 341. These requirements are conditions precedent to jurisdiction, even in ordinary cases and in ordinary courts. But Reasons's court was a special one, and in *Saunders v. Haynes*, 18 Cal. 145, it is held that the statute intended "to afford a new and summary remedy in cases of contested elections." So said our Supreme Court in *Ex parte Wimberly* and in *Crisler v. Morrison*, *ubi supra*, and it is a cardinal rule that in summary proceedings the law must be strictly pursued. Sedgw. on Stat. and Const. Law, 819; *Dorsey v. Barry*, 24 Cal. 449. Under the statutes (Acts 1878, p. 173, and the amendatory act of 1880), neither party can appeal to the Circuit Court without filing an affidavit and giving a bond for costs in a penalty of three hundred dollars within five days. The amendment could not

be made, because there was nothing to amend. The Circuit Court had no jurisdiction by virtue of the attempted appeal. *Winters v. Claitor*, 54 Miss. 341; *Kramer v. Holster*, 55 Miss. 248.

*W. S. Chapman*, on the same side.

Wilson is manifestly entitled to the office, because: 1. The magistrate's special court had jurisdiction of the case from its inception to the conclusion. The Chancellor's injunction suspending its action did not destroy its functions and the judgment was not void for this reason. *Ex parte Wimberly*, ante, 437. The magistrate's failure to qualify after his election, but entering on his official duties by virtue of his election and commission, did not affect the rights of third persons. Code 1857, p. 138, art. 194; Code 1871, § 317; *Cooper v. Moore*, 44 Miss. 386; *Kimball v. Alcorn*, 45 Miss. 151; *Brady v. Howe*, 50 Miss. 607; *Vicksburg v. Lombard*, 51 Miss. 111. 2. Wilson tendered his bonds in time. Acts 1873, p. 76. And he has the further time to give bonds, after a final adjudication of the suit by the highest judicial tribunal and until the office is declared vacant. *Harris v. State*, 55 Miss. 50. The requirement that the bond shall be executed in thirty days is directory, and if given by the person elected after that time, before the office is declared vacant, it would be in time. 3. Pearson never appealed. By the amendatory act of March 2, 1880 (Acts 1880, p. 125), two courses were open to him. He could appeal and not give his *supersedeas* bond, in which event Wilson would take the office pending the contest; or give that bond, in which case he would retain the office, provided he appealed. He did neither, but, giving the *supersedeas* bond alone, never gave an appeal bond. No amendment was allowable, because the court had no jurisdiction.

*Fant & Fant*, on the same side.

The three hundred dollar appeal bond was a condition precedent to the appeal. Acts 1878, p. 174. As it was not given, the Circuit Court could do nothing but dismiss. There was no jurisdiction. *Kramer v. Holster*, 55 Miss. 243. Wilson is then sheriff, by virtue of the verdict and the commission issued thereon, on his compliance with law. He has not lost his right by failure to qualify heretofore. Acts 1873,

p. 76. The position that the verdict is a nullity, because Reasons's term of office had expired, is untenable in view of his attempt to qualify; and, in any event, his acts as a *de facto* officer are binding. *Cooper v. Moore*, 44 Miss. 386; *Kimball v. Alcorn*, 45 Miss. 151; Code 1871, § 317. Neither is the judgment of the special court void by reason of the injunction. When the judgment was entered the tribunal was organized to try a subject-matter of which it had jurisdiction, and the parties were before it, and therefore its determination is not void. Pearson is estopped to say so, even if it was void; and, if he could make the defence, it would avail him nothing, for Wilson is the sheriff in possession.

CAMPBELL, J., delivered the opinion of the court.

The appeal by Pearson from the finding of the jury before the justice of the peace was void, because he gave no appeal bond, which was a condition precedent to an appeal. The bond prescribed by Chancellor Fly, and approved by him, to operate as a *supersedeas*, is not an appeal bond or a substitute for it. The Circuit Court properly refused the application for leave to amend the appeal, by giving a proper appeal bond. The act of March 5, 1878 (Acts 1878, p. 173), requires, as a condition of the right of appeal, the giving of a bond, within five days, "in the sum of three hundred dollars, to be approved by the justice, payable to the opposite party, conditioned for the payment of all costs." This requirement is unaffected by the act of March 2, 1880 (Acts 1880, p. 125), which provides for the appeal to operate as a *supersedeas* upon terms therein prescribed. No appeal bond having been given, or attempted to be given, there was nothing to amend. A defective appeal bond might perhaps have been amended, but the entire failure to give one could not be supplied by the Circuit Court. To do that would be to acquire jurisdiction by the action of the Circuit Court, whereas the law requires that an appeal prayed, and an appeal bond approved, by the justice, within five days, shall give jurisdiction of the case to the Circuit Court.

Reasons, the justice of the peace before whom the proceeding to contest the election was instituted, by virtue of his re-election to the office at the general election in November,

1879, and his attempt to qualify, and his continuance in possession of the office and exercising its functions, is to be considered as capable of the performance of valid official acts binding as such on all persons interested therein. The justice of the peace and all concerned did right to obey the injunction. Although it was afterwards held to be void, and that it might have been safely disregarded, those who respected the command of the State, made with a show of authority, are not to be punished for taking the safe course of obedience to its process. The interruption of the proceedings and suspension of the functions of the tribunal engaged in the process of organization for the trial of the contest, by the service of the injunction, did not destroy or extinguish it. The effect was as if a night or a non-judicial day had intervened. The proceedings were interrupted, not abandoned. The tribunal about to be organized was hindered, not destroyed. As soon as the hindering cause was removed, or what seemed to be a hinderance was found to be no real obstacle, it was proper to proceed as if nothing had occurred to interfere with the proceeding.

The official bonds presented by Wilson for approval on Feb. 16 and on May 17 were in time. The election being contested, the requirement to qualify within a prescribed time did not apply until the termination of the contest. We perceive no obstacle to the induction of Wilson into the office. The proper officers should proceed, without delay, to examine and approve the bonds required by law and presented by him for approval. The tribunal provided by law for the trial of the contest of the election, although hindered and delayed by shrewd devices, under color of legal process, at length proceeded with its duties, and a jury found that Wilson had the greatest number of legal votes at the election. This is the mode prescribed by law for ascertaining who had the greatest number of legal votes, and the finding must be respected as true, until reversed in the manner provided for by law. That manner is by appeal to the Circuit Court, to be taken in a prescribed way. It is the misfortune of Mr. Pearson that there was misapprehension as to the requirement of law for taking an appeal, and that, by non-observance of the law applicable to his case, he lost the opportunity afforded him by

law to test the correctness of the finding of the jury. This is no more than has often occurred to other litigants, and though much to be regretted is without remedy in his case as in any other. Such is the law applicable to all alike, and it is the duty of all citizens to uphold and maintain it, as in it is found the safeguard of the rights of every one.

*Judgment affirmed.*

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THE STATE v. W. H. HARNEY ET AL. THE STATE, USE,  
ETC. v. W. H. HARNEY ET AL.

57	863
89	799
89	800

1. TAX COLLECTOR'S BOND. *Validity. State and county taxes.*

Notwithstanding the omission from the Code of 1871 of the section requiring from the sheriff a tax collector's bond, the provisions of the Code recognizing such bond render it a valid security for State and county taxes, if voluntarily executed. *State v. Matthews, ante, 1*, explained. CAMPBELL, J., dissented.

2. SAME. *Liability of sureties. Alteration.*

The sureties upon a tax collector's bond, imposing on each a several liability for a specific sum, are not bound by an instrument made by a stranger by cutting off their signatures and attaching them to a new bond, which imposes a joint and several liability for the entire penalty.

3. SAME. *Change without altering liability. Sureties' agent.*

If, however, the sureties entrust the bond to the tax collector for delivery, and he, or a person employed by him, cuts off the signatures, which he attaches to an exact copy of the bond, made because the original is mutilated, they are bound by the new instrument after acceptance by the State.

4. SAME. *Affidavit by sureties. Estoppel.*

Sureties on the bond who, after its alteration, appear before the chancery clerk, under the act of March 11, 1872 (Acts 1872, p. 30), and sign the affidavit of solvency attached, in which they are described as "sureties on the within bond," are estopped to claim that the paper is not their bond by reason of their ignorance of the change.

5. SAME. *Separate justification. Writing names in affidavit.*

The rule is inapplicable to sureties who justify upon a separate paper which is not attached to the bond when the affidavit is made by the others; but it applies to those who write their names in the affidavit after the change in the bond.

6. TAX COLLECTOR'S BOND. *Duress. Threatened suit.*

The fact that the sheriff, who has executed a sheriff's bond, is induced to give the tax collector's bond by the board of supervisors threatening to proceed to have the office declared vacant unless he does so, is not such duress as renders the collector's bond a nullity.

7. SAME. *County taxes. Illegal levy. Money actually collected.*

Want of power in the tax collector to collect the taxes, by reason of the fact that the levy was not made at the county town (*Johnson v. Futch, ante, 73*), is no defence to a suit on the bond by the county for the money actually collected by him.

WRITS of error to the Circuit Court of Hinds County.

Hon. S. S. CALHOON, Judge.

These suits, upon the same bond, one for State and the other for county taxes, were conducted in the lower court and submitted in the Supreme Court together.

*T. J. & F. A. R. Wharton*, for the plaintiff in error.

1. Former decisions of this court erroneously hold that Code 1857, p. 71, art. 5, requiring a tax collector's bond, is repealed by Code 1871, § 8. Although there are as many provisions in the latter as in the former Code, as to the duties of the tax collector and suits on his bond, and, although Code 1871, § 1372, requires a copy of the assessment roll to be certified to the sheriff, yet this Code does not declare who shall be tax collector, or the bond he shall give as such, except that § 1376 requires him to give a bond for the collection of special taxes for county purposes. The former law was therefore not repealed by Code 1871, because the subject-matter was not revised and consolidated. The provisions of the latter Code, and subsequent statutes prior to the act of March 18, 1876 (Acts 1876, p. 8), indicate that the several legislatures so considered. The decisions of this court, including that of *State v. Matthews, ante, 1*, recognize the fact that from 1871 to 1876 sheriffs were authorized to collect taxes, and that such authority was not derived from the common law. It follows that it was conferred by the statutes in force when the Code of 1871 became operative. The fact that the tax collector is mentioned as a distinct officer in the Constitution of 1817, art. 4, § 17 (Hutch. Code, p. 30) abolishes the right of sheriffs to collect taxes under the common law, if it ever existed. An examination of the statutes of 1848,

1844, and 1846, cited in *French v. State*, 52 Miss. 759, and of 1822, 1833, and 1837 (Hutch. Code, 171, 174 *et seq.*), will show (1) that, to the time when the Code of 1871 took effect, the office of tax collector was a distinct office, even when its duties were performed in connection with the office of assessor of taxes, or of sheriff; (2) that no one was authorized to perform the duty of collecting State or county taxes until he had executed bond with good sureties; (3) that the act of 1846, § 32 (Hutch. Code, 191), in force when the Code of 1857 was adopted, and which is similar to art. 5, p. 71, thereof, provided that sheriffs should be tax collectors, and that, in addition to the sheriff's bond they should "give another bond for the collection of taxes." In previous rulings the court was embarrassed by the supposed dilemma that if Code 1857, art. 5, was repealed by Code 1871, § 8, it would follow that unless the collection of taxes pertained to the sheriff, as an incident of his office, there has not been, since October, 1871, a legal tax collector in this State. But by no authority, except the State Constitution or statutes, did the collection of taxes so pertain to the office of sheriff.

2. If the authority to collect taxes is vested in the sheriff by the Constitution or statutes of the State, and not by the common law, it results that he must conform to the provisions of the law conferring that authority, one of which is that he shall give a separate bond. In *French v. State*, reference is made to the understanding and intention of the people who ratified the Constitution of 1869, and to "a contemporaneous legislative interpretation that the Constitution intended that the sheriff should have the rights, authority and functions which pertained to him at common law, modified and suited to the conditions of society here." By a parity of reasoning we ascertain the intent of the legislature which adopted the Code of 1871 as to the officer to collect State and county taxes, and the security to be given by him therefor. We assume that the legislature and the codifiers intended that such taxes should be collected after the Code of 1871 should take effect. An examination of the chapters of the Codes of 1857 and 1871 on the subjects of Public Revenue and of the

Office and Duties of Sheriffs shows that most of the provisions of the former Code, on those subjects, are reprinted in the latter. It is unreasonable to suppose that it was the intention of the codifiers, of the judges of the Supreme Court who examined the Code, and of the legislature which adopted it, to diminish the security required by previous statutes for the collection and payment of taxes. In *Harris v. State*, 55 Miss. 50, it was said, "A careful perusal of chapter 22 of the Code clearly indicates the legislative will that the sheriffs, as tax collectors, shall give bonds." That decision was approved in *James v. State*, 55 Miss. 57. The bond in *Harris v. State*, was exactly like the one given by Harney. The suit in *James v. State* was for county taxes collected and not paid over. The defence was that it was a voluntary bond, not required by law, as James gave a sheriff's bond, which was then, and had been in force during his term; and this was held to be untenable.

3. Even if there were no statute requiring Harney to give the bond in these suits before he was authorized to collect the taxes of the State and county, still unless it violated or was in conflict with, some statute, it would constitute a contract binding between him and his sureties and the State to secure payment by him of money collected as taxes, due either to the State or county. It was so expressly held in *State v. Cooper*, 53 Miss. 615, on the authority of the opinion of Chief Justice Marshall in *United States v. Maurice*, 2 Brock. 96, and of Story, J., in *United States v. Tingey*, 5 Peters, 115. It results from the rule declared that the board of supervisors was authorized, unless forbidden by some statute, to require a bond of the character of that sued on as the condition upon which Harney would be permitted to exercise the duties of tax collector of Hinds County. That rule is fatal to the following matters set up as defences: viz., (1) that such bond is without any valid consideration to support it; (2) that it is void as a voluntary bond; (3) that it was coerced from the defendants in error by threat of the board of supervisors to declare the office of sheriff of Hinds County vacant unless such bond was given. The cases cited as decided by this court hold that it was as much the duty of the sheriff, after, as before,



the adoption of the Code of 1871, to collect State and county taxes. It follows that the defendants in error are estopped, by the recitals in the bond sued on, from denying that Harney was authorized as tax collector to collect the taxes claimed in these suits, or from denying their liability as his sureties for default by him in the payment of taxes so collected. Even in *State v. Matthews*, *ubi supra*, supposed to be in conflict with the above rule, it was conceded that such bond is valid security for payment by a sheriff of taxes collected for county purposes, if accepted for the State and county at any time before the office of sheriff and tax collector shall have been declared vacant.

4. It is no defence to the suit for the county taxes that they were levied by the board of supervisors sitting in Jackson, instead of in Raymond. That objection would avail to defeat the title of a purchaser of lands at a sale made under that levy. *Johnson v. Futch*, *ante*, 73. Before it could prevail as a defence to the tax collector and the sureties on his bond for not paying over money collected by him for taxes to Hinds County, they must show that such county taxes were not only illegally levied, but were not legally due to the county. By bringing the suit the county elected to look to the tax collector, and the sureties on his bond, for recovery of the money received for taxes. That operates in law a discharge of the tax-payers, and if the suit is defeated Harney will defraud the county of the large amounts collected by him.

5. The court below erred in overruling demurrers to the pleas which allege that the bond, after its execution, was altered by Taylor, without the knowledge or consent of the defendants in error. It also erred in sustaining the demurrers to the replications of the plaintiff in error. If any alteration was made in the bond, neither the State nor Hinds County can be prejudiced. No agent of theirs had any thing to do with it. The person to whom the obligors intrusted the bond after they signed it was their agent, to have it approved by the clerk of the Chancery Court. If approved by him, without knowledge of the change, a recovery by the State and county in these suits should not be defeated. *Graves v. Tucker*, 10 S. & M. 9; *Clopton v. Elkin*, 49 Miss. 95;

*Everman v. Robb*, 52 Miss. 653. To avoid the bond as to the sureties, the alteration must be a material one, made after it was executed and delivered, and by some one claiming under it. If done by a stranger, or one of the obligors, and without the knowledge or privity of the holder, the latter will not be affected. *Nichols v. Johnson*, 10 Conn. 192; *Medlin v. Platte County*, 8 Mo. 235; *Raper v. Birkbeck*, 15 East, 17; *Bridges v. Winters*, 42 Miss. 135. The change is shown by the replications to have consisted simply in converting printed into the same written words, which is not an alteration. The defendants in error are estopped to set up the alleged alteration by their affidavit made before the clerk of the Chancery Court when the bond was presented to, and approved by him, whether the change was in a material particular or not. They must be liable for the consequences of having misled the clerk, who was the agent of the State to approve the bond. Not one of the pleas alleges that any alteration was made in the bond after its approval and acceptance.

*T. J. Wharton* and *F. A. R. Wharton*, on the same side, each argued orally.

*Nugent & McWillie*, for the defendants in error.

1. It is admitted that, after the bond was signed, it was mutilated, as pleaded. Nothing was left of it but the signatures and affidavit as they stood annexed to the original bond. With these the sheriff constructed a new bond by the aid of paper and mucilage. An alteration of a bond, to be binding on the obligors, must be made before or at the time of signing, which is considered a re-execution. If the consent be given after, it will not repel the plea of *non est factum*. Alterations and interlineations of a material character in all instruments under seal make them absolutely void as to parties who have not consented previously or at the time. The bond cannot be rendered valid by a subsequent assent. *Cleaton v. Chambliss*, 6 Rand. 86; *Ex parte Decker*, 6 Cowen, 59; *Sans v. People*, 3 Gilman, 327; *Oneale v. Long*, 4 Cranch, 60; *War-ring v. Williams*, 8 Pick. 322; *Morris v. Vanderen*, 1 Dallas, 67. A paper signed and sealed in blank, with verbal authority to fill it up, which is afterwards done, is void as to the party so signing, unless he afterwards delivers it, or acknowl-

edges and adopts it. A signature in blank does not authorize any thing beyond a simple contract. *Warring v. Williams*, 8 Pick. 322; *Gilbert v. Anthony*, 1 Yerger, 69; *Byers v. McClanahan*, 6 Gill & J. 250; *Boyd v. Boyd*, 2 Nott & McCord, 125; *Perminter v. M'Daniel*, 1 Hill (S. C.), 267; *Sans v. People*, 3 Gilman, 327.

2. The replications to these pleas of alteration are not sufficient. It is not averred that the parties signing the affidavit had notice that the bond had been mutilated, and that they were signing a different obligation. To apply the estoppel to them in such case would go beyond any rule of law or principle of justice. Estoppel arises from an act or declaration of a person, calculated to mislead another, on which the latter has relied, and has so acted or refrained from acting, that injury will befall him if the truth of the act or declaration be denied. *Staton v. Bryant*, 55 Miss. 272; *Cowles v. Bacon*, 21 Conn. 451; *Stone v. Britton*, 22 Ala. 543; *Niantic Bank v. Dennis*, 37 Ill. 381; *Williams v. Jackson*, 28 Ind. 834; *Quirk v. Thomas*, 6 Mich. 76. No one is estopped by an admission made in ignorance of his right, induced by an innocent mistake of material facts. *Thrall v. Lathrop*, 30 Vt. 307. As was said in the case of *Dorlarque v. Cress*, 71 Ill. 380, the doctrine of equitable estoppel is based upon a fraudulent purpose and a fraudulent result, and if the element of fraud is wanting there can be no estoppel. *Brant v. Virginia Coal Co.*, 98 U. S. 326. The replications admit that the alteration was not known to the sureties when they signed the affidavit, and undertake to charge them without any allegations of negligence. This is not the law. Nothing short of the most culpable act of negligence could supply the want of actual knowledge. *Boggs v. Merced Mining Co.*, 14 Cal. 279; *Preston v. Mann*, 25 Conn. 118; *McCune v. McMichael*, 29 Ga. 312; *Copeland v. Copeland*, 28 Maine, 525; *Shaw v. Beebe*, 35 Vt. 205; *Commonwealth v. Moltz*, 10 Penn. St. 527.

3. A voluntary bond does not bind the obligors. Such a bond, given by a public officer, conditioned for the due performance of his duties, is nugatory. But a bond similarly conditioned, if required by statute, would be a condition precedent to entering into office, and, if not duly

executed according to the statute, would be a valid obligation at common law. *State v. Bartlett*, 30 Miss. 624; *Goodrum v. Carroll*, 2 Humph. 490; *Freeman v. Davis*, 7 Mass. 200; *Nunnery v. Cotton*, 1 Hawks, 222; *Mills v. Starr*, 2 Bailey, 359; *Newell v. Mayberry*, 3 Leigh, 250; *Perry v. Corwithe*, 18 Johns. 499; *Collard v. Groom*, 2 J. J. Marsh. 487. To give validity to the bond of a public officer, even as a common-law obligation, it must have been required by some statute. *Commonwealth v. Jackson*, 1 Leigh, 485. Since the decision of this court in *French v. State*, 52 Miss. 759, the question arising here was never doubtful, although complicated by several subsequent decisions. The sheriffs of the several counties in this State are *ex officio* tax collectors by force of the Constitution itself, as decided in *French v. State*. The duty of collecting the State and county taxes is devolved upon them by operation of law, and as decided in *State v. Matthews*, *ante*, 1, the bonds, given by them as sheriffs, are a security for the faithful discharge of duty as tax collectors for the State and county. That was their legal scope, and the intention of the obligors in the sheriff's bond could not affect it. Code 1871, § 219, requires the sheriff to give bond for the payment of all moneys collected by virtue of his office, and the faithful discharge of all the duties pertaining to the office; and gives the board of supervisors the power to increase the penalty of the bond to thirty thousand dollars. But, as it might happen that a special tax might be levied by the supervisors of any county for county purposes, Code 1871, § 1376, provides that a special bond may be required for the faithful collection and payment of the same. Hence the court said, in *State v. Matthews*, that, "as it might be true that the board had failed to exercise its right to require such bond because of the giving of the tax collector's bond sued on, under which the taxes levied by the board of supervisors had been collected, it was proper to regard the bond as having sufficient consideration to uphold it, as a security for county taxes." Even as thus explained, the decision in *Harris v. State*, 55 Miss. 50, may well be questioned to the extent stated. "Special taxes for county purposes" are one thing, and

“county taxes” generally, or those provided by law for the ordinary government of a county, are quite a different thing. The distinction is clearly drawn by the statute. In the one case the sheriff’s bond stands as adequate security, in the other it does not.

4. The bond framed by Harney, it is pleaded, was exacted by the board of supervisors under the Code of 1857, which required sheriffs to give special bonds as tax collectors, upon the idea that the provisions of that Code were in effect, and a threat that if it was not given, the board would have Harney ousted. But for this exaction and threat it would not have been given. There is no room for construction or presumption. The bond was unlawfully exacted, and was given under duress. It is clear, therefore, that it is a nullity, and cannot be sustained for the reason assigned in the case of *Harris v. State*, *ubi supra*. *Whitefield v. Longfellow*, 13 Maine, 146; *Baker v. Morton*, 12 Wall. 150; *Matthews v. Lee*, 25 Miss. 417; *Commonwealth v. Jackson*, 1 Leigh, 485.

5. A bond to be binding on the obligors must be delivered; it is not an executed contract until that is done. There can be no such thing as delivery to the State, considered either in respect to its territory or the aggregated people constituting the body politic. There must be some one appointed by law to receive the bond for and on behalf of the State or the county. If there be no such person so appointed, and no bond required by law, there can be no such thing as the execution or delivery of the bond, and hence no contract. The mere bringing of the suit could have no retroactive effect. If there were no law calling for the bond and appointing some one to receive it, it could not be a statutory bond. It could not be a common-law obligation, because a consideration and delivery are indispensably necessary to such a contract.

6. It is also pleaded that no county taxes were levied, the levy of taxes made by the board of supervisors at Jackson being a nullity. The point has been decided in our favor by this court. *Johnson v. Futch*, *ante*, 73. There were no county taxes collected by Harney. Before a collector can collect county taxes he must be supplied with a copy of the assessment roll, and a copy of a valid order of the board of super-

visors levying the rate per cent upon the persons and property subject to State taxes, according to the assessment of the particular year. These county taxes must be levied at the time and place appointed by law, or they are void. *Moore v. Foote*, 32 Miss. 469; *Shewalter v. Brown*, 35 Miss. 428; *McGehee v. Martin*, 53 Miss. 519; *Tupelo v. Beard*, 56 Miss. 582; *Board of Supervisors v. Klein*, 51 Miss. 807; *Dogan v. Griffin*, 51 Miss. 782; *Gamble v. Witty*, 55 Miss. 26. A tax collector is not protected in the execution of process, though regular on its face, if he has knowledge of the facts which render it void. *Leachman v. Dougherty*, 81 Ill. 324. The order of the board given to Harney showed on its face that it was made at Jackson. It is settled law in this State that when the levy of a tax is illegal and void, the taxpayer can recover back what he has paid from the collector while the money remains in his hands, and from the county if he has paid the money over. *Leonard v. Canton*, 35 Miss. 189; *Tuttle v. Everett*, 51 Miss. 27. But it is urged that the money was paid to Harney, and that his sureties must answer for it to the county. If the above authorities are to be relied upon, no such result would follow. What right has the county to the money? If Harney collected the money without authority of law, he alone is responsible for that illegal act, and his sureties are not liable. *Wood v. Stirman*, 37 Texas, 584. If the county were allowed to recover the money, it would only be to pay it to those from whom it had been unlawfully exacted. But the right to the money must be a legal right, and not an equitable claim. If there is no legal title or right to the fund there can be no recovery. The obligation of the sureties is to answer for the lawful taxes collected, and not for moneys illegally exacted; nor for trespasses committed by the collector. It is insisted, however, that the collector is estopped to set up the illegality and invalidity of the order, when, under color of it, he has collected taxes, and that his sureties are equally estopped; but this proposition is contrary to our own decisions. The moneys in Harney's hands belonged to the individual taxpayers, and were in no sense taxes due the county. *Whitfield v. Wooldridge*, 23 Miss. 183.

*W. L. Nugent*, on the same side, argued orally.

*M. Green*, on the same side.

1. The bond never had legal existence as a contract. Past-ing signatures and seals upon a bond with a different penalty and condition, without the knowledge or authority of the signers, was a forgery and imposed no liability. The affidavit alleged to be an adoption of the forgery is insufficient, because it is not alleged that the affiants knew of the forgery. There was no *consensio mentium*. The affidavit is no estoppel. (1) The affiants did not declare that they were "sureties on the within bond." These words are the recital of the officer. The only declaration made by the affiants was as to the value of their property. The affiants are not estopped to contradict the personal description made by the officer. (2) It is no part of the officer's duty, in administering the oath, to judicially determine and certify whether the affiant is a surety or not. The officer approving determines this fact. (3) All these elements must concur: a representation made with knowledge of the facts to a party ignorant of the truth, with intent that he shall act upon it, and he must be induced to act upon it. *Bigelow on Estoppel*, 494 *et seq.* The affiants did not represent that they had signed the "within bond"; it is admitted that they did not so state with knowledge of the facts. The affidavit differs from an acknowledgment in this: that the affiant is not then called upon to affirm or disaffirm the deed. (4) The affidavit is no part of the bond. Acts 1872, p. 30. (5) Nor is estoppel created by ignorance of the fact of forgery *Graves v. Tucker*, 10 S. & M. 9, is not in point. Every holder of forged paper is innocent.

2. The levy of taxes was illegal and void, because the board of supervisors had no power to levy taxes at Jackson. *Johnson v. Futch*, *ante*, 78. The sheriff is liable to the tax-payer for the amount paid. *McNutt v. Lancaster*, 9 S. & M. 570; *Coulson v. Harris*, 43 Miss. 728; *Tuttle v. Everett*, 51 Miss. 27. He could not be liable to both the tax-payer and the county. Illegality, not irregularity, of assessment is a defence. *Foxcroft v. Nevens*, 4 Greenl. 72; *Crutchfield v. Wood*, 16 Ala. 702; *County of Lewis v. Tate*, 10 Mo. 650; *Downing v. Roberts*, 21 Vt. 441; *McNutt v. Lancaster*, 9 S. & M. 570;

*Nares v. Rowles*, 14 East, 510. Sureties are liable to the tax-payer on void assessment. *State v. Shacklett*, 37 Mo. 280. It is said that, if the warrant is regular on its face, and the court issuing it has jurisdiction, the collector is not a trespasser and must pay the county; otherwise he must pay the tax-payer. *Cooley on Torts*, 460, 559; *Blackwell on Tax Titles*, 176, 187; *Bradley v. Ward*, 58 N. Y. 401; *Erskine v. Hohnbach*, 14 Wall. 618; *Burroughs on Taxation*, § 108. Here the warrant or writ showed on its face want of jurisdiction. The county has no title, and cannot recover by proving that the defendant has none. The condition is to pay over "all moneys collected by him, and to which said treasuries shall be respectively entitled." Under this, the defendants can show that the county is not entitled to the money. Under the statute, it was held that the declaration must aver that the taxes were legally assessed. *Whitfield v. Wooldridge*, 23 Miss. 183. This judicial construction prior to the Code of 1857 is conclusively presumed to be the legislative intent in its re-enactment.

3. Is a purely voluntary bond valid? If so, is a voluntary bond, not voluntarily given, valid? No law required this bond. *French v. State*, 52 Miss. 759. A voluntary bond is void. *State v. Bartlett*, 30 Miss. 624. Subsequent cases do not overrule this case. In *Byrne v. State*, 50 Miss. 688, it was held that an acting sheriff cannot defeat recovery by the plea that he is not sheriff. In *French v. State*, 52 Miss. 759, it is said that, though no law requires a bond, it is valid, if given, and *Byrne v. State*, *ubi supra*, is cited, which does not so hold. In *Harris v. State*, 55 Miss. 50, it is said that the above statement in *French v. State* was a *dictum*. In *Harris v. State*, the court did not seem to consider a voluntary bond involved, as afterwards shown by reasons stated in *State v. Matthews*. The basis of the former decision and other cases holding a tax collector's bond liable, is that, under a certain exigency, bonds could be required under Code 1871, § 1376, and this court would presume, in the absence of proof, that there was a consideration. Every presumption was in favor of the consideration of a sealed instrument, and, in the absence of proof, this presumption would be indulged.



Here all presumptions are repelled by the allegations of the plea. A voluntary bond, not voluntarily given, is void. *United States v. Tingey*, 5 Peters, 115.

GEORGE, C. J., delivered the opinion of the court in the case of the State taxes.

At the general election, in November, 1873, W. H. Harney was elected sheriff of Hinds County for the constitutional term commencing on the first Monday in January, 1874. He executed an official bond as sheriff, as required by law, and afterwards, on January 28, 1874, executed, or attempted to execute, a bond as tax collector, which was accepted and approved by the chancery clerk of the county. This is an action on this last bond against Harney and his sureties for a balance of unpaid taxes due the State collected by Harney during his term of office. The pleadings are very confused and complicated, arising, in great part, from the unnecessary separation of the several defendants, of whom there were eleven, in the pleas and rejoinders and demurrers; and from the further fact that matters of defence, which could have been made under the plea of *non est factum*, sworn to, were set out specially, requiring special replications to answer them. We shall not notice in detail these voluminous pleadings, extending over two hundred pages, but, at the request of counsel, proceed to decide the points of law necessary to a final determination of the case.

It is first objected that the bond sued on, if legally executed, which is denied, is nevertheless a voluntary bond without consideration, and therefore not binding on the obligors. This objection is based on the omission in the Code of 1871 to require any other bond from a sheriff than his official bond provided for in § 219. It is claimed that the bond required in that section is the only bond which the sheriff was required or even authorized to make, and, that being liable on this bond for taxes collected by him for the State, as was decided in *State v. Matthews*, ante, 1, he is not liable, nor are his sureties, on the bond executed specially in his character as tax collector. This position cannot be maintained without overruling at least six cases decided by this court with reference to

tax collectors' bonds taken under the Code of 1871. In *Byrne v. State*, 50 Miss. 688, a sheriff and his sureties on a tax collector's bond executed by him under the Code of 1871, were held liable for the State taxes collected and not accounted for by him. The same conclusion was reached, as to county taxes, in *Taylor v. State*, 51 Miss. 79. In *Lewenthall v. State*, 51 Miss. 645, the validity of a sheriff's bond as tax collector was also fully recognized, and such a bond was held to be an official bond from which the sureties could get relief, as in other cases of official bonds, under Code 1871, §§ 315, 316. In *French v. State*, 52 Miss. 759, the court held that, under the Code of 1871, the failure of the sheriff to give a tax collector's bond was not a cause of forfeiture of his office under § 319 of the Code, and in the same case held that tax collectors' bonds were valid, both for State and county taxes, and cited and reaffirmed *Byrne v. State*, *ubi supra*. In *French v. State*, 53 Miss. 651, an action on a tax collector's bond given under the Code of 1871 was defeated, upon the ground that it was unlawfully instituted, both the court and the counsel recognizing its validity. The next case in which the validity of these bonds was contested in this court is *Harris v. State*, 55 Miss. 50. In this case, the county of Rankin sued on the tax collector's bond for a balance of county taxes not accounted for. The sheriff's term commenced on the first Monday in January, 1874, and the bond was dated Oct. 17 following. It was objected to the action that the bond was given too late, and was moreover voluntary, there being no law authorizing or requiring it. The court said: "A careful perusal of chapter 22 of the Code clearly indicates the legislative will that the sheriffs, as tax collectors, shall give bonds. Thus § 1725 directs suit on the tax collector's bond for a failure to pay into the State and county treasuries the taxes collected by them. So § 1752 directs suit to be brought on the collector's bond, against principal and sureties, for a failure or omission to collect the taxes. Whilst there is a clear expression that bonds must be given for the good conduct of the officer, the Code is silent as to the time and the penalty. All other particulars are provided for. . . . It is impossible to say that, within the purview and intendment of such legis-

lation as this, it was illegal for Shelton [the sheriff] to have executed the bond; and that the State, having participated in the illegal transaction, cannot maintain an action upon it. Unmistakably the allusion in the statute was to the bond for the indemnity of the State and county. Shelton and his sureties so understood it; so did those appointed by law to accept and approve it. It was so understood and acted upon throughout the State." The court then proceeded: "Great strength is given to these views by § 1376, which provides that, when a special tax may be levied for county purposes, the board of supervisors may require the collector to give bond for the faithful collection and payment of the same." In *James v. State*, 55 Miss. 57, this case is cited and confirmed. In *State v. Matthews*, ante, 1, which is erroneously supposed to give countenance to the idea that tax collectors' bonds are invalid, it is said with reference to *Harris v. State*: "It is true, as stated in the opinion in that case, that there is abundant evidence in the Code of the legislative assumption of the fact that there was a tax collector's bond, but there is no requirement by the Code that a tax collector's bond should be given, except in the state of case provided for by § 1376." We are asked now to disregard all these cases containing express adjudications in some, and a clear recognition in the others, of the legality of tax collectors' bonds, because there is no requirement of them in the Code of 1871. In five of the above cases the validity of the tax collectors' bonds is recognized, although it is admitted that there is no provision in the Code of 1871 requiring their execution. We might well rest on the authority of these decisions of this court in favor of the validity of these bonds and on the maxim *stare decisis*. But, as they are assailed with great earnestness and ability, we will proceed to state the reasons which place their validity beyond successful impeachment.

It has been shown, in the quotations we have made from *Harris v. State* and *State v. Matthews*, that there is a plain recognition in the Code of tax collectors' bonds for the security of State and county taxes, notwithstanding there is no positive requirement for their execution. But that such bonds may be given, and that suits on them are directed to be instituted

to recover defalcations in State and county taxes, are undeniably plain provisions in the Code. The only difference, in the provisions of the Code, between them and other official bonds is that there is no provision fixing their penalty and time of execution, and no forfeiture of office imposed on the sheriff for a failure to execute them. Whether the failure to make these provisions was the result of oversight or design, cannot affect the force and validity of the enactments in the Code to which we have referred. These enactments are insufficient to compel the execution of these bonds as a condition precedent to the enjoyment of the office of sheriff and tax collector, but they are ample to validate them when voluntarily executed. They refer to legal and valid, not to invalid, bonds. Certainly the legislature did not direct suits to be brought on invalid bonds; and certainly the recognition by the legislature of such bonds as proper makes them legal; and, if such bonds are legal whose execution, acceptance and enforcement are recognized by law, they cannot be invalid. There is no other test of the validity of a contract, except that it is in accordance with law. What the law commands or permits, as in accordance with its behests, cannot be invalid. Tax collectors' bonds, executed under the Code of 1871, can stand this test, and must be treated, when given, as valid and obligatory contracts, unless we impute to the action of the legislature the absurd and contradictory effect of recognizing as good that which is invalid, only for the want of such recognition, and, unless we further impute to the legislature the folly of directing a suit to be brought on an instrument which must be held invalid for want only of the legislative sanction to its execution. These truths are so plain and self-evident that the validity of tax collectors' bonds would be at once acknowledged, but for an idea, growing out of *State v. Bartlett*, 30 Miss. 624, that the sole consideration of an official bond is that it is required to be executed as a condition precedent to the enjoyment of the office, and that without such consideration it is void. But it is well settled that an official bond, which may be lawfully taken, — that is, taken without violating law, though not required by law to be executed, — if voluntarily entered into, is valid. *United*

*States v. Tingey*, 5 Peters, 115; *Sooy v. State*, 38 N. J. 324, and authorities there cited. These cases hold that the actual enjoyment of the emoluments of the office is a sufficient consideration for supporting the bond, and that it is not essential to a valid consideration to support it, that it should be required by law. But if such a bond was without a valuable consideration, it would not follow that it would not be good when executed under the Code of 1871. That a consideration is necessary to support a contract results alone from a rule of law requiring it; and hence, as it has been shown that the Code of 1871 recognizes a tax collector's bond as valid and enforceable, if it be regarded as without consideration, then the Code validates the bond, though without consideration. The existence of valid contracts without a valuable consideration is not unknown either to the common or the civil law. In the latter, a species of contract consummated with certain formalities, and denominated a "stipulation," is valid without a valuable consideration; and in the common law, from the earliest period, the obligor in a sealed instrument was estopped to say that it was without consideration, which is the same thing as saying that a consideration is not necessary to support it. And this is the view stated in 1 Chitty on Contracts, 6, and by Lord Denman in *Cooch v. Goodman*, 2 Q. B. 580, 599. But for a statute in this State, bonds would be unimpeachable for want of consideration, and by a provision in the same Code in which this enactment is found, tax collectors' bonds are recognized as valid; and if they are to be considered as without consideration, they are by the Code made valid, as at common law, without it. Clearly, a requisite to the validity of a contract introduced by statute, may also be dispensed with by statute.

But it is urged that, as in *State v. Matthews*, ante 1, it was held that the sureties on the sheriff's bond were liable for his failure to pay over State taxes collected by him, it was also necessarily held that they were not liable on his tax collector's bond. Such is not the effect of that decision. It has been seen that the result of the decisions in this court supporting the opinion in that case, is that the Code of 1871, recognized the existence and validity of tax collectors' bonds, but that there was no provision in the Code by which the execution of such

bonds by sheriffs could be enforced. The execution of a sheriff's bond alone could be enforced by a forfeiture of the office in case it was not given. Since, then, as was held in *French v. State*, the tax collector's duties were inseparably incident to the sheriff's office, and were a part of the sheriff's official trust, it would follow, as held in *State v. Matthews*, that any failure of the sheriff to discharge any of his official duties with respect to taxes, would be a breach of his official bond, which required him faithfully to perform and discharge all the duties of the office of sheriff and all acts and things required by law, or incident to said office. This was the only bond which was required by law of the sheriff, the only one to secure the due execution of which any provision was made. It would follow that, in case no tax collector's bond was executed, there would be no security for the collection of the public revenue unless the sheriff's bond was a security. It was impossible, therefore, to resist the conclusion reached in *State v. Matthews*, that the sheriff's bond was a security for the collection of the taxes. No other security was with certainty provided, and the discharge of the duties of tax collecting was also plainly within the conditions of the sheriff's bond. Such being the law, it was rightly held in that case that the execution of a tax collector's bond did not narrow the scope of the sheriff's bond. Any other ruling would have left the scope and obligation of the sheriff's bond to be determined, not by law and the terms of the bond itself, but by the performance or non-performance of an act by the sheriff which he might or might not perform at his will. Being thus liable on his official bond for the collection and paying over of the taxes, and it being also well settled that a tax collector's bond, if given, would be lawful and obligatory, no other result can be reached than that the tax collector's bond is a cumulative security for the collection and paying over of taxes, and that the State or county has a remedy on either or both. What may be the respective rights of the sureties on these bonds as to contribution is not before us. The conclusion we have reached, as will be seen from the reasoning on which it is based, applies only to bonds executed under the law as it stood in the Code of 1871. The subsequent enactment,

in 1876, of a statute requiring sheriffs to give tax collectors' bonds, as a condition to entering upon their offices, has the effect to confine remedies for acts and omissions which would be breaches of such bonds to the obligors therein.

We will now proceed to determine the questions raised in relation to the execution of the bond. It is alleged on the part of the obligors that they executed a tax collector's bond for Harney, in which each obligor was separately bound for a specified amount, the aggregate of the several amounts equalling the penalty of the bond; and that, after they had executed it in this way, one Taylor, who was to be appointed a deputy sheriff by Harney, cut off the signatures of the obligors and attached them to the paper which constitutes the bond sued on, which is joint as well as several, and that this was done without their knowledge or consent; and that they never knew of this until this action was brought. We do not doubt that these facts alone constitute a good defence to the action, and made the bond sued on not the bond of the obligors. To obviate the effect of this, it is replied by the State (1) that the bond cut off from the signatures by Taylor had become mutilated and almost illegible, that for this reason it was copied *verbatim* and the copy attached to the signatures, and that the bond as it now appears is exactly the same in all respects as the bond executed by the parties; (2) that all the defendants except two, after the change was made by Taylor, made a joint affidavit, which was indorsed on the bond, as it was constituted by the change. This affidavit was substantially as follows: "Personally appeared before me, M. Peyton, Clerk of the Chancery Court of Hinds County, John H. Odeneal and [naming the others], sureties on the within bond, who each, being duly sworn, declared on oath that they are worth in freehold estate over and above all their just debts and liabilities and legal exemptions, property in this State, subject to execution at law, to wit [then follow the names and seals of each of the obligors with a sum in figures opposite his name, to represent the value of his property]. Sworn to and subscribed before me this 28th day of January, A. D. 1874. Signed, Murray Peyton, Clerk." This bond was also accepted

and approved on the day this affidavit was made. It is insisted that the replications setting up these facts are not good answers to the pleas above set out, because they do not aver that the affiants knew of the change in the bond when they made the affidavit. But we do not consider this a just view. By the act of March 11, 1872 (Acts 1872, p. 30), the chancery clerks were required in all cases to take the written examination, under oath, of sureties on official bonds approved by them, and to record these examinations with the bonds in their offices. They were not allowed to approve a bond without such examination as to the solvency of the sureties, and hence such examination became a condition precedent to such approval. When therefore sureties came before a chancery clerk and made an oath indorsed on the bond, in which it was recited that they were "sureties on the within bond," it must be regarded as a solemn affirmation on their part of their suretyship, and a request by them to the clerk to accept and approve the bond in the condition it then was as their act and deed. They cannot in such a case be permitted to aver that the paper on which such affidavit is indorsed, in the condition that it then was, is not their bond by reason of their ignorance of any alteration or change in the bond. They are conclusively presumed to know all that appears on the face of the paper, and to have assented to it in its then condition. Any other rule would leave the door wide open for the perpetration of fraud on the State, and render the security of official bonds precarious in the extreme. Support for this view will be found in *New Orleans Railroad Co. v. Burke*, 53 Miss. 200. As to the other two sureties, Bruce and Hill, it does not clearly appear from the replication whether or not the separate paper on which they justified as sureties was attached to the bond at the time the affidavit was made. If it was not so attached, the above rule would not apply to them, unless their names appearing in the affidavit made by the other sureties were written by themselves after the change in the bond was made. In that case, their signatures, so written in the affidavit, would have the same effect as the affidavit has as to the other affiants. Of course, if it could be shown that they had knowledge of the change in the bond at the time they made the



affidavit, or consented to the change, they would be concluded.

We regard also the first matter of replication, above set out, as a good answer to the pleas. The cutting off of the signatures from the first bond and the attaching of an exact copy in its stead was not the act of the State. It was the act of a person into whose hands it came before it reached the chancery clerk for acceptance and approval. As the obligors did not, after signing and sealing the bond, undertake to deliver the bond themselves, they must be considered as intrusting it to Harney to cause delivery to be made. They thus gave an agency to Harney in relation to the delivery. An act done therefore by Harney, or any person whom he should engage to make the delivery, if wholly immaterial to the obligors, not enlarging their liabilities, nor injuring them in the least, should be considered as the act of the obligors, and binding on them.

It is next pleaded against the validity of the bond, that Harney was duly elected sheriff and tax collector of Hinds County, and that he executed a sheriff's bond in the penalty prescribed by law, which was approved and accepted, and thereupon he was entitled to the office of sheriff and tax collector without executing any new or further bond; but that the board of supervisors of the county demanded a tax collector's bond unknown to the law, falsely claiming and insisting that the execution of such bond was necessary, and that unless the same was given they would proceed to have the office of sheriff declared vacant; and that Harney, coerced by and under duress of said board, executed and caused to be executed said bond. The circuit judge overruled a demurrer to this plea, and, as we think, incorrectly. The exact point was decided by the Supreme Court of New Jersey, in *Sooy v. State*, 38 N. J. 324. The threat of the board of supervisors was nothing more than to resort to legal proceedings to enforce their view of the law. As was said in the case above cited, the threat was either idle, such as neither the law nor any sensible person would regard, or meant that, in case of refusal to give the bond called for, a legal course would be pursued. A demand made under the urgency of an intimation that, if not complied with, the law will be appealed to,

cannot reasonably be claimed to be either extortion or duress. It does not, in legal contemplation, place the person against whom it is aimed *in vinculis*, nor destroy in any degree his free agency.

*Judgment reversed and cause remanded.*

CAMPBELL, J., delivered the following dissenting opinion.

I dissent from the conclusion that the bond given when no law required it, and when the law required another bond, which was duly executed, has any validity as security to the State for taxes. It is not obligatory as a common-law instrument for the want of a legal consideration. At common law the seal estopped the obligors from saying that there was no consideration, and thus the seal stood for a consideration; but happily we are freed from this absurdity by a statute which allows inquiry into the consideration of sealed instruments, and in this respect they are as simple contracts. It is certain that there was no legal consideration for this bond. No law required it. There was no advantage to the promisors, and no loss, injury or inconvenience to the promisee, by virtue of its execution. The obligors acquired no right, derived no advantage, made no gain, by reason of it. Harney had been duly elected sheriff. The execution of his bond as sheriff was a full compliance with law. No obligation rested on him to give another bond. No officer or tribunal could lawfully demand of him another bond as a qualification for his office, or displace or interfere with him for not giving another. The additional bond was therefore *nudum pactum*. It is not of force as a statutory bond, because not in compliance with any statute. No statute required it, or provided its penalty, or authorized any officer to require it, or to accept and approve it. It is true that the Supreme Court of the United States has decided in several cases that a voluntary bond given by an appointee to office, by virtue of the requirement of his superior officer, is valid; but the principle which supports this view is that such a requirement is within the range of the proper discretion of the officers of the government, and although no law may require it, if the appointing power requires a bond as the condition of entering or continuing to hold the office, it is valid when ex-

ecuted. This is the principle of *Sooy v. State*, 38 N. J. 324, cited in the opinion of the majority. Some courts, without noting the obvious principle on which these cases rest, have followed their result, and have held that official bonds not required by law are obligatory. The difference between an appointee to office whose superior officer, in the exercise of a sound discretion vested in him by law, requires a bond to enable his appointee to hold the office, and an officer elected by the people, according to law, to an office the qualification for which is prescribed by law, with an indefeasible right to the office upon the terms prescribed by law, with no law requiring a bond, and no superior or other person in authority with a discretion to exact a bond, is plain; and in *State v. Bartlett*, 30 Miss. 624, such a bond given by a public officer was held to be void. It may be conceded that this case is wrong, and still the bond here sued on is not enforceable. Here a bond was required, — a sheriff's bond, — a valid security for taxes and all other official duties. In giving that, Harney did all the law required. The additional bond, as I think, was mere waste-paper, required by no law, supported by no consideration.

CHALMERS, J. If I could regard the question of the obligatory force of a bond given by a public disbursing officer where no statute required the giving of it, as an open one, I should be inclined to hold with my brother Campbell, that such a bond was not binding. But this court, in at least five cases, has arrived at a different conclusion, and in so doing has followed the overwhelming weight of American authority, both State and Federal. Our own case of *State v. Bartlett*, 30 Miss. 624, stands almost, if not entirely, alone among cases decided during the last forty years, in declaring such bonds invalid, and is virtually overruled by the repeated decisions in the later volumes of our reports cited in the opinion delivered by the Chief Justice holding them obligatory. Elsewhere the decisions seem uniformly to hold the principals and sureties on such bonds liable for any default covered by their terms. *Brandt on Suretyship and Guaranty*, § 444. I do not feel at liberty to set my individual opinion of what the law ought to

be in opposition to this concurrent weight of authority as to what it is.

GEORGE, C. J., delivered the opinion of the court in the case of the county taxes.

In this case many of the questions which were presented in the preceding case are raised, and they are settled in the same way. It is necessary to determine only one question in this case not settled in the other. Among the many pleas interposed to this action was one to the effect, that the taxes for the county were levied by the board of supervisors, sitting in the city of Jackson instead of at the court-house in the town of Raymond. It has been held by this court that such a levy was irregular, and did not confer on the sheriff the power to seize and sell property. *Johnson v. Futch, ante*, 73. Whatever may have been the ancient rule on this subject, it seems now to be settled, in accordance with reason and justice, that the want of power in the tax collector to collect taxes, by reason of any irregularity in the assessment or other proceeding necessary to confer the power, is not a good defence to an action against him for non-payment of the money actually collected. He is treated as the agent of the State or county in collecting the money, and as having received it for the benefit of his principal; and he will not be permitted to rely upon technical objections which might be made to the right of the State or county to it. The tax-payers who paid the money voluntarily are considered as having paid it to him for the use of the treasury; and he will not be permitted, having thus received it, to question the right of the State or county to it. *Cooley on Taxation*, 497, 498, and authorities there cited. The objection is purely technical, and relates solely to the irregular execution of a power clearly vested in the board of supervisors. It is not pretended that the taxes levied were illegal, or in excess of the amount authorized by law to be laid on the people and property of the county. The sole objection is, that the board of supervisors, under a mistaken view of the law, held their sessions in the wrong judicial district of the county. These views seem to be conclusive against the tax collector who received the money. The sure-

ties on his bond are also liable, if the failure of the sheriff to pay over the money comes within the terms of the bond and constitutes a breach of it as written. This failure comes within the terms of the bond. We have shown that the county treasury is entitled to the money, and one of the conditions of the bond is that Harney "will promptly pay into the State and county treasuries all moneys collected by him and to which said treasuries shall be respectively entitled."

*Judgment reversed and cause remanded.*



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## ACCEPTANCE.

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## ACCORD AND SATISFACTION.

1. *The accord.*

To constitute accord and satisfaction an agreement is essential that the sum paid or act performed shall be accepted in satisfaction of the original demand. *Burrus v. Gordon*, 93.

2. *The satisfaction.*

Performance is essential to accord and satisfaction unless the promise was accepted in satisfaction. *Ib.*

3. *Joint creditors. Settlement with one.*

Accord and satisfaction with the nominal plaintiff in a disputed judgment, who is one of the usees therein, bars an action for the amount of the judgment by the other usees. *State v. Story*, 738.

## ACCOUNT.

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## ACCOUNT STATED.

1. *Definition. Payment.*

A stated account is an agreement, after an examination of the accounts between the parties, that the items are true, and the balance correct; and such an account, which shows itself satisfied, is evidence of payment. *Anding v. Levy*, 51.

2. *Merchants. Implied assent.*

The rule making an account rendered and retained without objection a stated account applies only in controversies between merchants. *Ib.*

3. *Admission. Evidence.*

But such rendering and retention between parties other than merchants is an element in the case for the consideration of the jury, so far as it shows an implied assent to the correctness of the account. *Ib.*

4. *Circumstances for the jury.*

In determining the weight to be given to such an account, the jury may, among other circumstances attending its rendition and retention, consider the intelligence and business capacity of the recipient, his confidence in the honesty and accuracy of the other party to the account, the length of time he has retained it, and his opportunities for examining it, as well as the course of dealing between the parties. *Ib.*

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1. *Married woman. Certificate. When made.*

An officer who has properly exercised the judicial function of taking a married woman's acknowledgment to her deed may perform the clerical act of making the certificate at any time while he remains in office, if third persons' rights do not intervene. *Harmon v. Magee*, 410.

2. *Same. Form of certificate.*

A certificate of acknowledgment by a married woman, which shows a separate examination, is not insufficient because it fails to show a separate acknowledgment. *Kenneday v. Price*, 771.

3. *Same. Duress. Conclusiveness of certificate.*

The officer's certificate is conclusive that the wife's acknowledgment was voluntary, in favor of grantees without notice of any undue influence. *Ib.*

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## ADMINISTRATION BOND.

1. *Suit on Bond. Ambiguity. Evidence.*

If an administration bond fails to state which of the obligors is administrator, it is not fatally ambiguous, but may be explained by the record of his appointment. *Paddleford v. State*, 118.

2. *Same. Variance. Pleading according to legal effect.*

Such bond should be admitted in evidence, if declared on according to its legal effect by distinguishing the administrator from the sureties. *Ib.*

8. *Bankruptcy. Discharge. Surety on bond.*

A surety who signs an administration bond before his adjudication in bankruptcy is not released from a liability thereon accruing after his discharge. *Ib.*

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

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See ACCOUNT STATED, 3; CHANCERY PRACTICE, 8, 9; CREDITOR'S BILL, 9; LIFE INSURANCE, 4.

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See PRINCIPAL AND AGENT.

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AGRICULTURAL LIEN.

1. *Affidavit for writ of seizure. Amendment.*

A justice of the peace, before whom affidavit for a writ of seizure has been made, and who has failed to sign it, may affix his name in open court after motion to dismiss. *Hartsell v. Myers*, 135.

2. *Proceeding in rem. No judgment in personam.*

The justice can give no judgment against a defendant for the sum due the plaintiff other than one to be satisfied out of the property seized. *Hartsell v. Myers*, 185; *Burrow v. Sanders*, 211; *Mitchell v. Drake*, 605.

3. *Costs. Personal judgment therefor.*

He may, however, render a personal judgment against a defendant for any balance of costs not paid by the property seized, after paying the plaintiff what is due him. *Burrow v. Sanders*, 211.

4. *General judgment. How limited.*

The judgment in such a case, although expressed in general terms, should be construed with reference to the nature of the proceeding as regulated by law and exhibited by the record. *Ib.*

5. *Claimant's bond. Duty of officer.*

The officer who seizes products under such proceeding before a justice of the peace must hold them subject to the result of the suit, and cannot surrender them to a claimant on a forthcoming bond. *Mitchell v. Drake*, 605.

6. *Bond unauthorized by statute. Common-law action thereon.*

If such bond is taken, no summary judgment can be rendered thereon in the lien suit, but it may be sued on as a common-law obligation. *Ib.*

7. *Judgment. Officer's liability.*

The proper judgment for the plaintiff in the lien suit, under such circumstances, is condemnation and sale of the products, leaving him at liberty to proceed against the officer for failure of duty or to sue on the bond. *Ib.*

8. *Implied contract.*

Under the agricultural lien law (Acts 1876, p. 109) a writ of seizure will lie against a tenant, although there is no express contract to pay rent; for the word "agreed" in the statute embraces an agreement implied by the conduct of the parties. *Love v. Law*, 596.

9. *Purchaser of products. Notice of lien.*

Under the agricultural lien law a landlord can maintain an action against a purchaser with notice of cotton subject to a lien for rent. Acts 1876, p. 109. CAMPBELL, J., dissented. *Dunn v. Kelly*, 825.

10. *Suit against purchaser. Effect of absence of notice.*

*Quære*, Can the action be maintained if the purchaser had no notice. *Ib.*

11. *Jurisdiction. Void writ of seizure.*

A writ of seizure for one hundred and eighty dollars, under the agricultural lien law (Acts 1876, p. 109), is void, if issued by one justice of the peace returnable before another; and the officer who takes property thereunder is a trespasser. *Breckenridge v. Johnson*, 371.

12. *Circuit Court. Jurisdiction. Appearance. Waiver.*

After the owner of the property seized has taken it from the officer by an action of replevin, the return of the writ of seizure to the Circuit Court does not give jurisdiction; nor is such owner's motion to dismiss the lien suit a waiver of its nullity. *Ib.*

13. *Replevin for property seized. Amendment. Res judicata.*

The owner, who has given bond and holds the property, is entitled to judgment in the replevin suit, notwithstanding the Circuit Court, after amending the writ of seizure, has rendered judgment against him for the debt in the lien proceeding. *Ib.*

14. *Statement of claim. Waiver. Amendment.*

A defendant in a writ of seizure, under the agricultural lien law (Acts 1876, p. 109), who takes issue on the affidavit which sets out the plaintiff's claim, waives the filing of a statement thereof on the return day, and the court should, on affidavit of merits, allow the plaintiff to amend by filing such statement. *Allen v. Standifer*, 612.

15. *Amendment. Erroneous denial.*

After the suit has been pending for two terms, upon the issue on the affidavit for the writ, it is erroneous to give judgment for the defendant when both sides are ready for trial, and the plaintiff tenders his statement and offers to continue the case at his costs. *Ib.*

See CERTIORARI.

ALTERATION OF INSTRUMENTS.

See MUNICIPAL CORPORATION, 15, 16; TAX-COLLECTOR UNDER CODE 1871, 2, 4-8.

ALTERNATIVE WRIT.

See CONTESTED ELECTIONS, 7.

AMBIGUITY.

See ADMINISTRATION BOND, 1; CHATTEL MORTGAGE; DEED OF TRUST, 1, 2; EVIDENCE, 1; SPECIFIC PERFORMANCE, 2.

AMENDMENT.

1. *Statute of Limitations. Chancery pleading.*

If the period of the bar of the Statute of Limitations elapses pending a bill to foreclose a married woman's mortgage for plantation and

family supplies, which is afterwards decided to be void, an amended bill can be maintained to enforce the statutory charge for the supplies. *Cooper v. Allen*, 604.

2. *Same. Lunatic. Parties.*

A suit against the guardian of a lunatic will not stop the running of the Statute of Limitations in favor of the latter, against whom no recovery can be had, if the account is barred pending the suit, although he is subsequently made a party by amendment. *Potts v. Hines*, 735.

See AGRICULTURAL LIEN, 1, 13-15; APPEAL, 3; CIRCUIT COURT, 3; CONTESTED ELECTIONS, 10; CREDITOR'S BILL, 5; EMINENT DOMAIN, 2; GARNISHMENT.

### AMOUNT IN CONTROVERSY.

See CIRCUIT COURT, 1; SUPREME COURT, 2, 3.

### ANSWER.

See CHANCERY PLEADING, 7; CHANCERY PRACTICE, 8, 9; CREDITOR'S BILL, 9; REVIEW, BILL OF, 12.

### APPEAL.

1. *Not matter of right. Regulated by statute.*

Appeals are not matters of right, but are allowable only in the cases and on the terms prescribed by the statute, which are conditions precedent that must be complied with in order to give the appellate court jurisdiction. *Bridges v. Supervisors*, 252.

2. *Bond. Suit in forma pauperis.*

A litigant, who has commenced suit *in forma pauperis* in a Justice's Court, cannot appeal without bond from an adverse decision. Const., art. 6, § 23; Code 1871, §§ 571, 1332. *Woods v. Davidson*, 206.

3. *Affidavit. Failure to date and sign. Amendment.*

A justice of the peace, who has neglected to date and sign an affidavit for an appeal, should be permitted to affix the date and signature in the Circuit Court on motion to dismiss. *Green v. Boon*, 617.

4. *Return day in Supreme Court. Citation.*

If an appeal is granted by the court at the term when the decree appealed from is entered, no citation is required, and the case should be docketed at the next term of the Supreme Court, although it occurs within less than ten days after the appeal is taken. *New York Hospital v. Knox*, 600.

5. *Same. The ten days' notice.*

If, however, the appeal is granted after the term at which the decree appealed from is entered, Code 1871, § 481, requires citation to be issued and served on the appellee ten days prior to the return day of the appeal. *Ib.*

6. *Supreme Court practice. Continuance.*

The fact that an appeal in the former case is taken so near the return day of the Supreme Court as to exclude reasonable time for preparation, should be considered on an application for a continuance or for delay in calling the case. *Ib.*

See BANKRUPTCY, 2 ; BOARD OF SUPERVISORS; CHANCERY PRACTICE, 5, 6; CONTESTED ELECTIONS, 9, 10; ESTATES OF DECEASED PERSONS, 8, 9; MUNICIPAL CORPORATION, 19; OBSTRUCTION TO WATERCOURSE, 2-5; SUPREME COURT, 2; UNLAWFUL ENTRY AND DETAINER, 1, 2.

APPEARANCE.

See AGRICULTURAL LIEN, 12.

APPELLATE PRACTICE.

See VESTED RIGHTS.

APPROPRIATION OF PAYMENTS.

See DEED OF TRUST, 4.

ARBITRATION.

See FRAUDULENT CONVEYANCE, 2-5.

ASSAULT.

1. *Weapon. Variance.*

Under an indictment for assault with a pistol, the accused cannot be convicted of an assault with another weapon. *Lanier v. State*, 102.

2. *Same. Res gestae. Animus.*

But assaults with other weapons immediately preceding that with the pistol may be considered in determining the *animus* of the accused. *Ib.*

3. *Indictment. Verdict.*

An indictment for assault, with intent to murder, will support a conviction of assault, even if the higher crime is proved. *Ib.*

4. *Apparent intent.*

One who shoots a pistol at a man, apparently designing murder, commits an assault, although he intends no injury. *Smith v. State*, 39 Miss. 521, limited. *Ib.*

See CRIMINAL LAW AND PROCEDURE, 1, 2; HOMICIDE; INDICTMENT, 1.

## ASSESSMENT ROLL.

See PURCHASER IN GOOD FAITH, 3, 4.

## ASSIGNEE IN BANKRUPTCY.

1. *Attachment. Bankruptcy of defendant. Assignee's rights.*

The assignee of a bankrupt, who has become a party to an attachment sued out against the latter before his adjudication, can, if a plea in abatement of the writ is sustained, recover damages on the bond in right of the bankrupt, under Code 1871, ch. 13, art. 10. *Darcy v. Spivey*, 527.

2. *Bond. Damages. Verdict. Remittitur.*

If the damages awarded by the jury against the plaintiff in attachment are excessive, the assignee can remove the objection by entering a remittitur. *Ib.*

See BANKRUPTCY, 2; CREDITOR'S BILL, 6, 7; JUDGMENT LIEN, 6.

## ASSIGNMENT.

1. *Balance to be settled. Attachment.*

Acceptance of an order to pay a specific sum out of any balance due on settlement with the drawer takes precedence of a garnishment in attachment against the drawer, which is served on the acceptor before settlement. *Menken v. Gumbel*, 756.

2. *Partial assignment. Enforceable in equity, but not at law.*

A written assignment of an interest in a note is not enforceable at law against the debtor without his express assent and assumption; but the assignee can maintain a bill in equity. *Hutchinson v. Simon*, 628.

See ASSIGNEE IN BANKRUPTCY; CONSPIRACY; MARRIED WOMAN, 13; VENDOR AND VENDEE, 1; WITNESS, 4.



## ASSUMPSIT.

See COVENANT, 2.

## ATTACHMENT.

1. *Grounds for attachment. Debtor's undervaluation of his assets.*

No clause in the statute (Code 1871, § 1420), which specifies the grounds for attachment, makes an undervaluation of his property by a debtor who is seeking a compromise with his creditors a cause for its issuance. *Roach v. Brannon*, 490.

2. *Same. Concealment of assets and refusal to pay.*

The ground that he has property, which he conceals and unjustly refuses to apply to his debts, is not sustained by proof that he offered a creditor only twenty-five cents on the dollar when his assets equalled half his debts, and stated that if his offers were rejected his creditors would get nothing. *Ib.*

3. *Same. Surviving partner. Changing the form of assets.*

A surviving partner's investment of part of the firm assets in a retail liquor license is no ground for attachment, if he owes no individual debts and intends to sell out the stock, consisting entirely of liquor, at retail, in order to realize more for the firm creditors. *Ib.*

4. *Same. Charitable donations. Yellow-fever epidemic.*

He does not subject himself to attachment by allowing to the family of his deceased partner support out of the firm assets for a few weeks after an epidemic of yellow fever and while he is winding up the business. *Ib.*

5. *Same. Burden of proof. Estoppel.*

The plaintiff in attachment must establish the truth of the facts averred in his affidavit, except where such averments are made in reliance on the defendant's language or conduct, so that he is estopped from showing the contrary. *Cocke v. Kuykendall*, 41 Miss. 65, explained. *Ib.*

6. *Same. Estoppel by conduct. Constituents.*

To constitute such estoppel, the language or conduct must be such as to have warranted the averments of the affidavit, the affiant must have believed them to be true, and have been led to that belief by the acts or declarations of the debtor. *Ib.*

7. *Same. Fraud in law and in fact.*

Fraud in fact or in law constitutes ground for attachment; and although its existence must be established by the plaintiff, the jury should sustain the writ if they believe from the facts, notwithstanding the defendant's denials, that the intent existed, or the necessary consequence of the act was to defraud creditors. *Ib.*

8. *Attachment against surviving partner. Grounds therefor.*  
An attachment can be sued out by a firm creditor against the surviving partner and levied on the assets of the partnership, but such creditor must aver and prove one of the specific grounds for attachment enumerated in the statute. *Ib.*
9. *Same. Distinction between individual and firm creditors.*  
*Semble*, that circumstances may exist which will justify the issuance of an attachment by a firm creditor against the partnership assets in the hands of a surviving partner, although his individual creditors cannot sustain one on the same facts. *Ib.*
10. *Same. Unfair preference among creditors.*  
*Semble*, that the application by a surviving partner of firm assets to his individual debts is a violation of the clause of the statute which forbids an unfair preference among creditors. *Ib.*
11. *Wrongful attachment. Measure of damages. Compensatory only.*  
Damages for the wrongful issuance of an attachment under the statute must be compensatory only. *Ib.*
12. *Same. Elements to be taken into account.*  
The elements of damages defined by Code 1871, § 1462, consisting of lawyers' fees, travelling expenses, hotel bills, loss of trade, and special injury to business, are exclusive of all others. *Ib.*
13. *Same. Loss of trade. Surviving partner.*  
If the writ is levied on the firm assets in the hands of a surviving partner, who is winding up the business, no loss of trade can be estimated. *Ib.*
14. *Same. Injury to credit. Insolvency.*  
There can be no injury to credit if both the survivor and the firm are hopelessly insolvent. *Ib.*
15. *Same. Lawyers' fees. None for cross-action.*  
Lawyers' fees can be allowed only for defending the attachment suit, exclusive of the cross-action for damages. *Ib.*
16. *Same. Number of lawyers employed.*  
Fees can be allowed for one firm of lawyers only, unless the jury are satisfied by the evidence that the necessities of the case required more. *Ib.*
17. *Not a suit in personam. Plea to merits no waiver.*  
Under the act of Feb. 21, 1878 (Acts 1878, p. 193), the doctrines of *Leventhall v. Mississippi Mills*, 55 Miss. 101, are so changed that the attachment is a separate proceeding from the action for the debt, and the defendant may take issue on the latter without waiving his right to plead in abatement of the former. *Bates v. Crow*, 676.
18. *Jurisdiction of Circuit Court. Return by constable. Alias writ.*  
If a constable returns an attachment writ to the Circuit Court, with a replevy bond for property which he has seized, it is improper to dis-

miss the proceeding *in personam*; and if the plaintiff asks for an *alias* writ, under the rule in *Barnett v. Ring*, 55 Miss. 97, the proceeding *in rem* should also be retained. *Ib.*

19. *Garnishment. Jurisdiction. Territorial limits.*

The courts of the county of a garnishee's residence have jurisdiction of an attachment against a householder who resides in another county, to whom the garnishes is indebted. *Cain v. Simpson*, 53 Miss. 521, distinguished; *Barnett v. Ring*, 55 Miss. 97, cited. *Smith v. Mulhern*, 591.

20. *Interpleader. Judgment. Res inter alios acta.*

The judgment sustaining an attachment, upon the ground that the assignment of a fund in a garnishee's hands is fraudulent, does not bind the assignee upon the trial of the issue under his claim by way of interpleader. *Menken v. Gumbel*, 756.

See ASSIGNEE IN BANKRUPTCY; ASSIGNMENT, 1; CLAIMANT'S ISSUE; GARNISHMENT; LANDLORD AND TENANT, 3, 4; PLEADING, 2, 6.

## ATTORNEY AND CLIENT.

*Lien for fee. Land recovered.*

An attorney, who has recovered land for his client, in an action of ejectment, has no lien thereon, to secure his fee. *Martin v. Harrington*, 208.

See ATTACHMENT, 15, 16; DEED, 10; EXECUTOR AND ADMINISTRATOR, 3, 5; INFANT, 1; PARTNERSHIP, 1, 4; PRACTICE, 1.

## AUCTION.

See TAX SALE, 2.

## AUDITOR.

See TAX TITLE, 2-5.

## BAIL.

1. *Capital case. Rule in lower court.*

Under the Constitution of Mississippi, Bill of Rights, § 8, bail in a capital case is a matter of right, if a well-founded doubt of the prisoner's guilt be entertained. The rule in *Wray's Case*, 30 Miss. 673, affirmed; *Moore's Case*, 36 Miss. 137, *Beall's Case*, 39 Miss. 715, and *Street's Case*, 43 Miss. 1, criticised. *Ex parte Bridewell*, 39.

2. *Rule in Supreme Court.*

The Supreme Court applies the same rule, subject to the *prima facie* presumption that the decision appealed from was correct. *Ib.*

8. *Judicial discretion.*

If the proof of guilt is evident, bail in a capital case rests in sound judicial discretion, to be exercised only under exceptional circumstances. *Ib.*

4. *Habeas Corpus. Evidence. Continuance.*

Practice upon applications for bail by *habeas corpus*, as to the burden of proof, the evidence for the prosecution, postponement by the judge for further testimony, and as to the sufficiency of the bond. *Ib.*

5. *Same. Res adjudicata. Code 1871, § 1413.*

Judgment admitting to bail on a writ of *habeas corpus*, is conclusive of the right to bail only on the facts existing at the time; and on a state of case subsequently arising, as, for instance, the finding of an indictment for murder, the question can be reinvestigated, and, on additional evidence, bail may be refused. *Ex parte Bridewell*, 177.

## BAILMENT.

See COMMON CARRIERS.

## BALLOT.

See PARTITION, 5, 6.

## BANKRUPTCY.

1. *Discharge. Fiduciary debt.*

The liability to a bank of its collecting agent, resulting from his appropriating to his own use the proceeds of notes and drafts sent to him by the bank, to which they were intrusted for collection, is not a fiduciary debt, and is dischargeable under the bankrupt law. *Green v. Chilton*, 598.

2. *Assignee. Appeal.*

A bankrupt may appeal from an adverse decree, if his assignee, who has been made a party to the suit, fails to plead or assert any claim in behalf of creditors. *Hughes v. Thweatt*, 376.

See ADMINISTRATION BOND, 3; ASSIGNEE IN BANKRUPTCY; CREDITOR'S BILL, 6, 7; JUDGMENT LIEN, 5, 6.

## BEQUEST.

1. *Limitation. Perpetuity.*

A bequest to a man "during his life, and at his death to his child or children then living and the descendants of such child or children and their heirs for ever," makes him absolute owner, so that he can dispose of the entire interest to the exclusion of the limitees. *Caldwell v. Willis*, 555.

2. *Void limitation. Interest of first donee.*

If void limitations are engrafted upon a bequest manifesting an intention to dispose of the entire interest in the personality, it vests absolutely in the first legatee. *Ib.*

3. *Same. Remainder after life-interest. Perpetuity.*

The limitation, after the life-interest, to the legatee's "child or children then living, and the descendants of such child or children and their heirs for ever," is void because it violates the rule against perpetuities. *Ib.*

4. *Same. Limitation to a class. Void as to individual.*

If the limitation is void as to any of the persons in the class to which it is made, it is void as to the whole class. *Ib.*

5. *Same. Contingent legacy. Rule against perpetuity.*

A limitation by way of executory bequest is void, if the absolute interest may not vest within a life or lives in being at the testator's death, and twenty-one years and ten months thereafter. *Ib.*

6. *Conditional limitation. "Dying without children."*

The Act of 1822, § 26 (Hutch. Code 610), applies only to limitations contingent on a person dying without children or descendants, and does not add the words "then living" to a limitation to the descendants of the donee of a life-interest. *Ib.*

7. *Construction of will. Supplying words.*

If the testator's intent, manifested by the entire will, carefully prepared by a skilful conveyancer, was to omit the words "then living," they will not be supplied by the court, in order to sustain the limitation. *Ib.*

8. *Same. Rejecting words.*

While a word may be rejected, if the other parts of the will show that it was improperly and incautiously used, it will not be discarded on a mere conjecture, based on a presumption that the testator intended a provision similar to the Statute of Distributions. *Ib.*

9. *Same. Land to be sold for legacies. Personality.*

If land is directed to be sold, and legacies paid with the proceeds, it will be treated by a court of equity, in construing the will, as personal property, even before the sale. *Ib.*

See WILL.

## BILL OF EXCEPTIONS.

1. *Recital of signing. Effect thereof.*

A bill of exceptions, which states that it was signed during the term at which the action objected to took place, cannot, in the absence of fraud, be successfully assailed upon the ground that in fact it was signed in vacation. *Kimball v. Mückell*, 632.

2. *Fraud. Signing in vacation. Consent.*

The mere fact that the bill of exceptions is signed in vacation does not show fraud, if it also appears that it is so signed with the consent of the parties. *Ib.*

3. *Made of record by judge's signature. Filing.*

It is unnecessary for a bill of exceptions to be marked filed by the clerk in order to be made a part of the record, but it becomes such by the signature of the judge. *Ib.*

## BILL OF EXCHANGE.

1. *Acceptance. Principal and agent. Evidence.*

Parol evidence is admissible, between the parties, to show that the intent of an acceptance of a domestic bill drawn by H. and accepted by B., "agent of H.," was to charge, not B. personally, but H., whose funds B. held. *Hardy v. Pilcher*, 18.

2. *Demand and notice. Promissory note.*

Such accepted bill is in effect the note of the drawer, whose liability is not terminated by lack of presentment to the acceptor, or of notice of non-payment. *Ib.*

3. *Failure to indorse. Suit in payee's name.*

A purchaser for value, without indorsement, of a bill of exchange, payable to order, can sue thereon in the name of the payee. *Meggett v. Baum*, 22.

4. *Accommodation acceptor's liability.*

The acceptor in such case is liable, although his acceptance was merely for the accommodation of the drawer. *Ib.*

5. *Release of acceptor. Forbearance. Extrinsic evidence.*

But he can prove that, being a surety, he is released by a contract of forbearance to the drawer, made by the purchaser with knowledge of the fact. *Ib.*

6. *Indorser's liability.*

The indorser of a bill of exchange warrants his title; and, if the indorsement by which he holds is a forgery, his indorsee can recover back the money paid him for the bill. *Williams v. Tishomingo Savings Institution*, 683.

See GUARANTY; SET-OFF, 2.

## BILL OF REVIEW.

See REVIEW, BILL OF.

BILL TO IMPEACH DECREE.

See CHANCERY PLEADING, 1-4; DECREE, 8; ESTATES OF DECEASED PERSONS, 8.

BILLS AND NOTES.

See BILL OF EXCHANGE; GUARANTY; PROMISSORY NOTE.

BOARD OF SUPERVISORS.

1. *Circuit Court. Practice on appeal.*

On appeal to the Circuit Court from a decision of the board of supervisors, under Code 1871, § 1383, the judge must try the case on the bill of exceptions signed by the president of the board, and can render no judgment but that of affirmance or reversal. *Bridges v. Supervisors*, 252.

2. *Appeal. Trial and judgment. No jurisdiction by consent.*

The board of supervisors has no power to consent to any other mode of trial, or to give the Circuit Court jurisdiction to render a judgment not authorized by the statute. *Yalobusha County v. Carbry*, 3 S. & M. 529, distinguished. *Ib.*

See COUNTY; COUNTY TAX; FERRY; PURCHASER IN GOOD FAITH, 4-6; TAX COLLECTOR UNDER CODE 1871, 2, 8; TAX TITLE, 1.

BONA FIDE PURCHASER.

See PURCHASER IN GOOD FAITH.

BOND.

1. *Bond of indemnity. Sureties. Notice of acceptance and default.*

The sureties on a bond conditioned to answer for the debts and defaults of a sewing-machine agent, who is the principal obligor, and to whom the bond is delivered, are neither guarantors nor sureties on a guaranty, and are not entitled to notice of the obligee's acceptance of the bond, or the agent's subsequently contracted debts. *Cox v. Weed Sewing Machine Co.*, 350.

2. *Same. Ultra vires. Plea. Certainty.*

In an action by the corporation, which is the obligee in such bond, to recover the principal obligor's note and his debt of one dollar, a plea by the sureties that the plaintiff had no power to make the contract sued on, if allowable at all, must state which contract is meant, and wherein it is beyond the corporate powers. *Ib.*

3. *Same. Breach. Principal's voluntary note.*

Such note, made after execution of the bond, if without consideration, cannot be collected from the sureties in that suit. *Ib.*

4. *Same. Notice to obligee. Warning.*

The mailing, before any machines are delivered, of notice to the plaintiff not to let the agent have them, is no defence to such action. *Ib.*

See ADMINISTRATION BOND; AGRICULTURAL LIEN, 5-7; APPEAL, 2; ASSIGNEE IN BANKRUPTCY; CHANCERY CLERK; CONSIDERATION, 4; CONTESTED ELECTIONS, 9, 10, 13; GUARDIAN AND WARD; INJUNCTION BOND; MUNICIPAL BONDS; PLEADING, 2; TAX COLLECTOR UNDER CODE 1871.

### BURDEN OF PROOF.

See ATTACHMENT, 5; BAIL, 4; CHANCERY PLEADING, 7; CRIMINAL LAW AND PROCEDURE, 11; FRAUDS, STATUTE OF, 5; LIFE INSURANCE, 1.

### BURGLARY.

See INDICTMENT, 1.

### CERTIFICATE OF ACKNOWLEDGMENT.

See ACKNOWLEDGMENT.

### CERTIORARI

1. *Agricultural lien law.*

*Certiorari* lies, by virtue of Code 1871, § 1336, to remove to the Circuit Court a case under the agricultural lien law (Acts 1876, p. 109) decided by a justice of the peace. *Burrow v. Sanders*, 211.

2. *Practice in Circuit Court. Judgment.*

The Circuit Court should, in such case, examine the questions of law appearing on the face of the record and proceedings, and affirm or reverse the justice's judgment. *Ib.*

3. *Immaterial error. Supreme Court.*

Although the *certiorari* is erroneously dismissed, the judgment of the Circuit Court will not be disturbed, if the same result would be reached by examining the questions of law presented by the record and proceedings. *Ib.*

See EMINENT DOMAIN.



## CHANCERY.

1. *Partition. Sale of infant's land.*

A court of equity can order land to be sold for partition among joint tenants, some of whom are minors. *Wilson v. Duncan*, 44 Miss. 642, affirmed. *Cocks v. Simmons*, 183.

2. *Probate Court decree. Execution thereof.*

The Chancery Court must, on the administrator's application, execute a probate insolvency decree, only erroneous as to a party who has not appealed. *Hendricks v. Pugh*, 157.

3. *Erroneous probate decree. How corrected.*

The Chancery Court cannot, on such application, vacate such decree for error therein, which can be reached only by reversal or bill of review. *Ib.*

4. *Removal of clouds. Remedy at law.*

A bill in chancery can be maintained by the real owner of land, against a person in possession, under Code 1871, § 975, to cancel a void tax-deed and a title-bond from one who never had title. *Wofford v. Bailey*, 239.

5. *Writ of assistance.*

The jurisdiction under the statute is exhausted when the clouds on the title are removed, and the court cannot put the complainant in possession of the land. *Ib.*

6. *Res adjudicata. Bill to remove clouds. Ejectment.*

In the action of ejectment to which the complainant must resort to obtain possession of the land, the defendant may set up any title which he has other than that adjudged void in the chancery proceeding. *Ib.*

See ASSIGNMENT, 2; CHANCERY CLERK; CHANCERY COURT; CHANCERY PLEADING; CHANCERY PRACTICE; CIRCUIT CLERK, 2; CONTESTED ELECTIONS, 1, 2, 5, 12; CREDITOR'S BILL; ESTATES OF DECEASED PERSONS, 13; ESTOPPEL; HUSBAND AND WIFE, 6; JURISDICTION, 3; MARRIED WOMAN, 1, 18; PARTITION, 1-3; PARTNERSHIP, 6; REVIEW, BILL OF, 11; SPECIFIC PERFORMANCE; WILL, 4.

## CHANCERY CLERK.

*Official bond. Extent of liability.*

The sureties on a chancery clerk's official bond are not liable for money received by him from the sale of assets of a decedent's estate, which he made as special commissioner appointed by the court to complete the sale. *Alcorn v. State*, 273.

See CHANCERY PRACTICE, 2.

## CHANCERY COURT.

1. *Commissioner's fee for stating account.*

A commissioner's compensation for stating an account should not exceed the fair and reasonable value of the work done. *Barton v. Parker*, 144.

2. *Probate practice. Master's report. Exceptions.*

On appeal from a decree confirming an administrator's final account, as restated, this court will not review the master's conclusions of fact, to which no exceptions were filed. *Murff v. Paterson*, 146.

See CHANCERY.

## CHANCERY PLEADING.

1. *Bill to impeach decree. Infant.*

An infant may, by original bill, impeach a decree improperly rendered against him. *Sledge v. Boone*, 222; *Enochs v. Harrelson*, 465.

2. *Same. Guardian's final settlement.*

Such a bill, which shows error in a guardian's final settlement, is not demurrable, although called a bill of review. *Sledge v. Boone*, 222.

3. *Same. Infant. Evidence aliunde.*

Under Code 1871, § 1265, a party may, within a year after attaining majority, attack by original bill a decree rendered against him during minority by alleging error to be shown by evidence *aliunde*. *Mayo v. Clancy*, 674.

4. *Same. Attitude of party more than a year after he is of age.*

After the year he stands to the decree as if he was an adult when it was rendered, except that upon a charge of fraud and imposition in obtaining the decree the helplessness and inexperience of his infancy may be considered. *Ib.*

5. *Plea of want of consideration. Assignee of note.*

A plea of total want of consideration is sufficient in law to a bill in chancery by the assignee of a promissory note to foreclose a mortgage on real estate executed by the maker to secure it. Code 1871, § 2228. *Hughes v. Thweatt*, 376.

6. *Same. Reply. Fraud.*

In order to show that there was a consideration, the complainant should take issue on the plea; or, if the maker executed the note and mortgage to defraud his creditors, that fact should be replied. *Ib.*

7. *Answer. New matter. Burden of proof.*

The burden of proving new affirmative matter, set up in the answer and not responsive to the allegations of the bill, is upon the respondent. *Osborne v. Crump*, 622.

See AMENDMENT, 1; CHANCERY; CHANCERY PRACTICE, 7-9; CIRCUIT CLERK, 3; CREDITOR'S BILL, 9; DECREE, 3; LIMITATION OF ACTIONS, 12; MARRIED WOMAN, 6; REVIEW, BILL OF.

### CHANCERY PRACTICE.

1. *Publication for unknown parties. Affidavit.*

An affidavit to support an order of publication for unknown defendants is insufficient, if it only states that the other parties interested are unknown, and does not further aver that diligent exertions have been made, without success, to ascertain their names. Code 1871, § 1069. *Kirkland v. Texas Express Co.*, 316.

2. *Clerk cannot be agent for litigants.*

A clerk of court, and especially a chancery clerk, who, in this State, exercises quasi judicial functions in many official acts, cannot act as the agent of a litigant in his court, although he receives no compensation for such agency. *Ib.*

3. *Partition bill. Evidence of indivisibility of land.*

In partition proceedings, although the act of Feb. 25, 1875 (Acts 1875, p. 119), dispenses with the appointing of commissioners, proof of the necessity of a sale of the land must be made by documentary evidence, or depositions taken on notice, and the *ex parte* affidavit of the complainant's solicitor is not legal proof. *Ib.*

4. *Sale of land. Inadequacy of price. Epidemic and quarantine.*

A sale of the land in such a case should be set aside, if made for a grossly inadequate price, when the yellow-fever prevailed at adjoining places, and, owing to a quarantine, the parties interested were prevented from being present. *Ib.*

5. *Pending appeal. No step in lower court.*

Without a summons and severance no step can be taken in the Chancery Court in a case which is pending in the Supreme Court on appeal by one defendant from a decree overruling a demurrer of all the defendants to the bill. *Kelly v. Brooks*, 225.

6. *Pro confesso. Setting aside. Judicial discretion.*

If such decree is affirmed and the cause remanded, a *pro confesso* entered against a defendant who failed to appeal, after the time for answer allowed by the Chancery Court, but within the time allowed his co-defendant by the Supreme Court, may be set aside in the exercise of a sound judicial discretion. *Ib.*

7. *Several defendants. Default of one. Final decree.*

No final decree can be rendered against a defendant who has suffered a *pro confesso*, if, upon the answer and proof of another defendant, the complainant is not entitled to relief. *Ib.*

8. *Answer as evidence. Setting for hearing.*

If a complainant sets down the case for hearing on bill and answer, he admits the truth of the answer, so far as it is responsive to the bill, although five months have elapsed since it was filed. *Surget v. Boyd*, 485.

9. *Same. Negative pregnant. Exception.*

A denial of a charge in a bill based upon all the circumstances of time and place mentioned therein, although bad pleading, cannot be treated as an admission, but must be reached by exception to the answer. *Supervisors v. Paxton*, 701.

10. *Deposition. Commissioner. Disqualification.*

A deposition should be suppressed, if taken by a commissioner who is the uncle of the party on whose behalf the witness is examined. *Groves v. Groves*, 658.

See BANKRUPTCY, 2; CHANCERY; CHANCERY COURT; CHANCERY PLEADING; CONTESTED ELECTIONS, 1-5, 12; CREDITOR'S BILL; DECREE; DEED, 6-10; EXECUTION SALE; FERRY, 5; FRAUDULENT CONVEYANCE, 4-6; INJUNCTION BOND; INTEREST; JURISDICTION; MARRIED WOMAN, 12, 17; PARTIES; REVIEW, BILL OF.

## CHARTER.

See MUNICIPAL CORPORATION, 2, 3, 18, 19.

## CHATTEL MORTGAGE.

1. *Description. Uncertainty.*

A chattel mortgage must contain such terms of description as will serve to distinguish the property embraced therein from all other property of the same kind. *Kelly v. Reid*, 89.

2. *Ambiguity. Parol evidence to explain.*

A mortgage of "80 head of cattle, 3 horses, and 2 mules," is void for uncertainty; but if the animals were described as belonging to the grantor, who owned only that number of each class, *semble* that the mortgage would be valid, and the animals could be identified by parol evidence. *Ib.*

See DEED OF TRUST, 1, 2.

## CIRCUIT CLERK.

1. *Execution for costs. Notice to debtor. Oppression.*

A circuit clerk, who is, like other officers, a public trustee, cannot use the powers and opportunities of his position for purposes of oppression

or speculation; and his right to issue process for his costs must be exercised with the utmost good faith, after notice to the debtor, if his residence can be found by reasonable diligence. *Davis v. Bell*, 320.

2. *Chancery jurisdiction. Constructive trust. Fraud.*

Such a clerk, who, after a judgment-debtor has paid his costs and promised to pay the others', procures, to strengthen a void tax-title, another officer's claim, and, without notice to the debtor, whose residence and ample personal estate he knows, issues execution, will be held, in equity, the debtor's trustee of the land on which he has it levied, and buys, through an agent, at a sacrifice. *Ib.*

3. *Chancery pleading. Multifariousness. Full relief. Epidemic.*

The judgment-debtor can recover in his bill touching the land, additional costs paid under protest and occasioned by the first execution, and the clerk issuing another for a balance of costs not realized at the sale, and endeavoring thereunder to sell other land in a town quarantined against yellow-fever when the debtor is a refugee from the State. *Ezelle v. Parker*, 41 Miss. 520, distinguished. *Ib.*

See HABEAS CORPUS, 3.

## CIRCUIT COURT.

1. *Jurisdiction. Amount in controversy.*

In the absence of an attempt to evade the constitutional limitations, a suit in the Circuit Court for five hundred dollars should not be dismissed because the plaintiff testifies that an account for a sum under the jurisdictional limit is correct. *Fenn v. Harrington*, 54 Miss. 783. *Potts v. Hines*, 785.

2. *Trial by judge. Finding of facts.*

In the absence of the separate finding of the law and the facts authorized by Code 1871, § 650, it will be presumed that the judge based his general finding on the case as made by the evidence; and, if on the whole proof it appears to be correct, the judgment will be affirmed. *Weathersby v. Thoma*, 296.

3. *Practice. Variance. Jeofails.*

The objection of variance must be distinctly raised before verdict, in order that the court may determine the propriety of an amendment, and asking an instruction which is too vague to admonish the court or the opposing party is insufficient for the purpose. *Greer v. Bush*, 575.

See AGRICULTURAL LIEN, 12, 13; ATTACHMENT, 18; BOARD OF SUPERVISORS; CERTIORARI; EMINENT DOMAIN, 2; JUSTICE OF THE PEACE; MUNICIPAL CORPORATION, 19; NEW TRIAL, 1; OBSTRUCTION TO WATERCOURSE, 3-5; UNLAWFUL ENTRY AND DETAINER, 2.

## CITATION.

See APPEAL, 4; CHANCERY PRACTICE, 1, 2; ESTATES OF DECEASED PERSONS, 4.

## CITY.

See MUNICIPAL CORPORATION.

## CLAIMANT.

See AGRICULTURAL LIEN, 5-7; CLAIMANT'S ISSUE.

## CLAIMANT'S ISSUE.

1. *Form of tendering.*

Under Code 1871, §§ 858, 859, 860, where goods seized under attachment are claimed by a third person, the plaintiff's averment that, at the date of the seizure, they were the property of the defendant and subject to the attachment, is a sufficient tendering of issue upon the claim. *Smokey v. Wack*, 832.

2. *Same. Surplusage in tender of issue.*

Averments in the plaintiff's tender of issue that the property at the date of the seizure did not belong to the claimant, who was not and is not the owner thereof, are useless, but do not vitiate the proper averment. *Ib.*

## CLOUD ON TITLE.

See CHANCERY, 4-6; MARRIED WOMAN, 16.

## COHABITATION.

See MARRIAGE; UNLAWFUL COHABITATION.

## COLOR OF TITLE.

See COUNTY TAX, 2.

## COMITY.

See CONFLICT OF LAWS.

## COMMISSIONER.

See CHANCERY CLERK; CHANCERY COURT; CHANCERY PRACTICE, 3, 10;  
DEED, 6-8, 10; ESTATES OF DECEASED PERSONS, 1.

## COMMON CARRIERS.

*Steamboat. Landing passengers.*

The owner of a steamboat, the custom on which is to notify passengers when their landings are reached, is liable for the negligence of its clerk in directing a lady, who has placed herself in his care, to disembark at night at the wrong landing, and for that of persons to whom the clerk has deputed the performance of this duty. *Carson v. Leathers*, 650.

## COMPROMISE.

See EXECUTOR AND ADMINISTRATOR, 6.

## CONCEALED WEAPONS.

1. *Threatened with an attack.*

The exception in the statute to prevent the carrying of concealed weapons (Acts 1878, p. 175), in favor of a person "threatened" with an attack, does not contemplate mere denunciation, but menace such as to cause a reasonable apprehension of an attack that would properly be resisted with that kind of a weapon. *Tipter v. State*, 685.

2. *Same. Reasonable apprehension. Question for jury.*

Whether the accused carried the weapon because of apprehension justly and honestly entertained on good and sufficient reason, is a question for the jury, and an instruction, which announces the negative as a legal conclusion, is erroneous, although it recites the facts of the case which tend to that conclusion. *Ib.*

## CONDITION.

See BOND.

## CONFLICT OF LAWS.

1. *Domiciliary and ancillary administrations.*

The principle that a grant of letters testamentary or of administration confers no power in a foreign State applies without exception or qualification to ancillary administrations, but as to domiciliary administrations there are recognized exceptions. *Klein v. French*, 662.

2. *Same. Executor's power over foreign debt. Suit and payment.*  
The domiciliary administrator, or executor, may receive payment from or sue a debtor residing in a foreign jurisdiction if he voluntarily comes within the State in which the administration is granted. *Ib.*
3. *Same. Payment in foreign jurisdiction. Subsequent administration there.*  
A voluntary payment to such executor or administrator by a foreign debtor in a State where there are no debts and no ancillary administration is a good acquittance even if an ancillary administrator is afterwards appointed. *Ib.*
4. *Same. Ancillary administration. Transmission of surplus.*  
In the absence of special reasons making proper a distribution by the ancillary administrator, he should transmit the surplus, after paying citizens of the foreign State, to the domiciliary administrator who is entitled thereto. *Ib.*
5. *Same. Ownership of debts. How sued for in foreign jurisdiction.*  
The principal administrator is the owner of all debts due the intestate, the evidence of which such as bills and notes are in his possession, wherever the debtor resides, but generally must sue in a foreign jurisdiction by means of ancillary administration. *Ib.*

See EXECUTOR AND ADMINISTRATOR, 4; LIFE INSURANCE, 5; MARRIED WOMAN, 3.

#### CONSIDERATION.

1. *Parol evidence. Written instrument.*  
The rule which excludes parol evidence tending to contradict a written instrument is inapplicable to evidence of failure of consideration. *Meyer v. Casey*, 615.
2. *Same. Sealed contract.*  
The distinction between sealed and unsealed instruments, as to the right to impeach the consideration, does not exist in this State. *Ib.*
3. *Same. Sealed note.*  
The real consideration for a sealed note, as distinguished from the expressed consideration, may be shown by parol evidence in a suit thereon. *Cocke v. Blackburn*, 689.
4. *Bond. Ancestor and heir.*  
The extinguishment of an indebtedness of an intestate is a sufficient consideration to support the bond of a distributee of his estate. *Bissinger v. Lawson*, 36.

See BOND, 3; CHANCERY PLEADING, 5, 6; FRAUDULENT CONVEYANCE, 8; PROMISSORY NOTE, 2-4.



CONSPIRACY.

*Object. Civil wrong.*

A general creditor, who procures the assignment of a deed of trust which his debtor has given on his exempt personalty, and substitutes a trustee, who refuses to receive payment, sells the property, and produces a balance which the creditor garnishes, is with his accomplice guilty of conspiracy, if they acted in concert under an agreement to accomplish the result. *Ellzey v. State*, 827.

CONSTABLE.

See ATTACHMENT, 18; REWARD.

CONSTITUTIONAL LAW.

See BAIL, 1; CRIMINAL LAW AND PROCEDURE, 6; FERRY; IMPRISONMENT FOR DEBT, 1; JUROR, 1; MARRIAGE; MUNICIPAL CORPORATION, 1-14; OFFICE, 1; PROBATE COURT AND PROCEEDINGS, 1; UNLAWFUL COHABITATION, 2.

CONSTRUCTION.

See BEQUEST, 7-9; CHATTEL MORTGAGE; DEED OF TRUST, 1; STATUTE, 1.

CONTEMPT.

See CONTESTED ELECTIONS, 1, 4, 5; HABEAS CORPUS, 3, 4; JURISDICTION.

CONTESTED ELECTIONS.

1. *County office. Injunction. Contempt.*

An order of the Chancery Court imprisoning a contestant for obtaining a verdict in violation of its injunction of the prosecution of an election case for a county office is void, and he may be discharged on *habeas corpus*. *Ex parte Wimberly*, 487.

2. *Same. Chancery jurisdiction. Exclusive remedy by statute.*

Under our system a court of equity has no jurisdiction, under any circumstances, to enjoin the prosecution, before a justice of the peace, of such a case of contested election. The means provided by the statute (Acts 1878, p. 173) are exclusive of all others. *Ib.*

3. *Same. Statutory tribunal. Writ of prohibition.*

If the tribunal for such contest is properly organized, no court can interrupt its proceedings within its statutory powers, and the sole remedy for a fatal defect or want of jurisdiction is the common-law writ of prohibition, issuing out of a superior law court. *Ib.*

4. *Same. Injunction.*

The facts that the justice of the peace is a political friend of the contestant and that the constable is his brother are no grounds for enjoining the contest; but that would afford no excuse for violating the injunction, if, under any possible state of case, its issuance were within the power of the court. *Ib.*

5. *State officers. Chancery jurisdiction.*

An injunction from the Chancery Court to restrain a contest of the election for governor and State officers, under Code 1871, § 391, or for legislators, under Code 1871. §§ 388, 389, would be *coram non judice*, and could be disobeyed with impunity. *Ib.*

6. *County office. Summons. Jurisdiction.*

In a case of contested election for a county office, under the act of March 5, 1878 (Acts 1878, p. 173), failure of the justice of the peace to issue and make returnable the summons within twenty-five days after the election establishes *prima facie* want of jurisdiction, which can be met by the contestant, if at all, only by averment and proof that the delay was not the result of his concurrence or neglect. *Crisler v. Morrison*, 791.

7. *Same. Prohibition. Alternative writ. Petition.*

Upon the sworn petition of the defendant in such a case, stating the facts, and averring that the summons was not issued when the petition for contest was filed by direction of the contestant, who is illegally proceeding to procure a verdict, an alternative writ of prohibition may issue, returnable to the Circuit Court, notwithstanding the right of appeal without *supersedeas*, to the same tribunal under the statute. *Ib.*

8. *Same. Practice in prohibition proceedings. Declaration. Waiver.*

The contestant and justice, who appear to the alternative writ, cannot compel the petitioner in the prohibition proceeding to file a declaration without showing a disputed fact, to be settled before the absolute writ is directed to issue; and, if they acquiesce in the hearing of his motion for an absolute writ for want of an answer to his petition, they waive their prior motion for a declaration. *Ib.*

9. *Same. Appeal. Bond.*

Under the act of March 5, 1878 (Acts 1878, p. 173), no appeal from the special tribunal which tries a contested election for a county office can be taken without an appeal bond for costs; and this is not altered by the statute which provides for *supersedeas*. Acts 1880, p. 125. *Pearson v. Wilson*, 848.

10. *Same. Appeal bond. Failure to execute. Amendment.*

The appeal cannot be amended in the Circuit Court by executing the bond required by the former statute in a case where the only bond given was the one for *supersedeas* authorized by the latter. *Ib.*

11. *Same. Justice of the peace. Failure to qualify. Official acts.*  
Verdict and judgment, rendered by the special tribunal after the expiration of the justice's official term, bind the contestants, if being re-elected he continues in possession of the office exercising its functions, although his attempt to qualify anew is frustrated. *Ib.*
12. *Same. Special court. Injunction. Reorganization.*  
The fact that the contestant and justice of the peace desist from proceeding, in obedience to a void injunction issued by the Chancery Court at suit of the defendant, does not prevent the special tribunal from reassembling after dissolution of the writ, and concluding the case. *Ib.*
13. *Same. Official bond. When given by contestant.*  
The requirement that official bonds shall be given within a specified time does not apply to the contestant until the termination of the contest, when, if he has a verdict not appealed from, the proper officers should approve his bond. *Ib.*

See JURISDICTION; OFFICE.

#### CONTINUANCE.

See APPEAL, 6; BAIL, 4; HABEAS CORPUS, 5; JUDICIAL DISCRETION.

#### CONTRACT.

See ACCORD AND SATISFACTION; ACCOUNT STATED; AGRICULTURAL LIEN, 8; CHATTEL MORTGAGE; CONSIDERATION; CORPORATION; COVENANT; DEED; DEED OF TRUST; FRAUDS, STATUTE OF; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE; LIFE INSURANCE, 1; MARRIED WOMAN; PARTNERSHIP; PRIVILEGE TAX; PROMISSORY NOTE; RECEIPT; SALE; SPECIFIC PERFORMANCE; TAX COLLECTOR UNDER CODE 1871; VENDOR AND VENDEE.

#### CONVERSION.

See EXECUTOR AND ADMINISTRATOR, 5.

#### CONVICT.

See COUNTY CONTRACTOR; HABEAS CORPUS, 1, 2; IMPRISONMENT FOR DEBT.

#### CORPORATION.

*Shareholder. Liability for corporate debts.*

Liability of a stockholder, to the extent of his unpaid subscription, under Code 1871, § 2413, to a creditor of the corporation, whose debt

was contracted during his ownership of the stock, is not discharged by a release executed by the corporation when solvent in consideration of a payment in excess of the calls and a surrender of half his shares. *Vick v. LaRochelle*, 602.

See BOND, 2; MALICIOUS PROSECUTION; MUNICIPAL CORPORATION.

### COSTS.

See AGRICULTURAL LIEN, 8; CHANCERY COURT, 1; CIRCUIT CLERK; COUNTY CONTRACTOR, 2-4; EJECTMENT, 4; ESTATES OF DECEASED PERSONS, 8-12; EXECUTOR AND ADMINISTRATOR, 5; FRAUDULENT CONVEYANCE, 6; IMPRISONMENT FOR DEBT; OBSTRUCTION TO WATERCOURSE, 4, 5; PARTY WALL, 2; SLANDER, 2; SUPREME COURT, 3.

### COUNTY.

1. *Public money. Donation. Jurisdiction.*

The judgment of any court ordering a donation to be made out of the public treasury is void. Claims against a county cannot be adjudicated on motives of generosity. *Bridges v. Supervisors*, 252.

2. *Res adjudicata. Estoppel by judgment.*

Parties to the record, in such case, which discloses no valid demand, are not concluded by an adverse judgment therein, from prosecuting any legal claim against the county. *Ib.*

See BOARD OF SUPERVISORS; COUNTY TAX; PURCHASER IN GOOD FAITH, 5, 6.

### COUNTY CONTRACTOR.

1. *Removal of convict out of county.*

Under the act to reduce judiciary expenses (Acts 1878, p. 164), prisoners can be removed out of the county in which they were convicted by the contractor of an adjoining county. *Ex parte Higgins*, 824.

2. *Custody. Punishment.*

The contractor is entitled to the custody of a convict sentenced to a fine and costs and imprisonment in the county jail, by virtue of the statute to reduce judiciary expenses (Acts 1878, p. 164), the fourth section whereof fixes the date when the prisoner's labor begins to be applied to the fine and costs. *Matthews v. Walker*, 337.

3. *Expenses of keeping prisoner. Costs of habeas corpus.*

The sheriff who keeps the prisoner in jail after the contractor demands him, and not the county or the prisoner, is chargeable with the jail fees, as well as the costs of a writ of *habeas corpus* sued out by the contractor to obtain custody. *Ib.*

4. *Prisoner's right to discharge.*

Imprisonment until the fine and costs are paid is intended for a security only, and when they are satisfied the contractor should discharge the prisoner, provided the term for which he was sentenced by the court to imprisonment, as a part of the punishment, has expired. *Ib.*

## COUNTY OFFICE.

See CONTESTED ELECTIONS.

## COUNTY TAX.

1. *Levy. Board of supervisors. Place of meeting.*

The levy of the taxes of Hinds County for the year 1875 was void, because not made at a place where the board of supervisors was authorized by law to hold its sessions. *Johnson v. Futch*, 73.

2. *Ejectment. Void tax deed. Color of title.*

A deed from the State, based on a sale for the taxes so levied, is void; and, to recover the land, the vendee of the former owner thereof, for whose taxes it was sold, is not compelled to trace title independently of a common source. *Ib.*

See TAX COLLECTOR UNDER CODE 1871, 9.

## COVENANT.

1. *Warranty. Ejectment. Notice to defend.*

A warrantor who has verbal notice of an ejectment suit against his warrantee and opportunity to defend, although no such demand is made on him, is concluded by the result, and cannot show title when sued on his warranty. *Cummings v. Harrison*, 275.

2. *Same. Assumpsit. Purchasing paramount title.*

Assumpsit will lie, under the rule laid down in *Kirkpatrick v. Miller*, 50 Miss. 521, as well by a remote as by the immediate vendee of a warrantor to recover money paid in purchasing a paramount title. *Ib.*

3. *Plea of general performance.*

A plea of general performance is demurrable in an action of covenant in which specific breaches are assigned. *Emanuel v. Laughlin*, 3 S. & M. 312, cited. *Burrus v. Gordon*, 93.

## CREDITOR.

See ACCORD AND SATISFACTION, 3; CREDITOR'S BILL; DEED, 1; FRAUDULENT CONVEYANCE; LIMITATION OF ACTIONS, 18; PURCHASER IN GOOD FAITH, 1-4; SHERIFF; WITNESS, 2.

## CREDITOR'S BILL.

1. *Creditors' administration bill. Jurisdiction of Chancery Court.*

Under Code 1871, § 976, the Chancery Court has jurisdiction of a bill against an executor by creditors of the testator with judgments against the estate, to compel final settlement, or payment of their *pro rata* shares in advance of such settlement. *Clopton v. Haughton*, 787.

2. *Same. Estates of deceased persons. Devastavit. Probate remedies.*

The Chancery Court, by virtue of the statute, has power to establish a *devastavit* and render a personal decree against the executor and his sureties, and is not restricted to the old probate remedies embodied in the Code. *Ib.*

3. *Same. Practice. Executor as trustee. Limits of jurisdiction.*

The court may treat the executor as the holder of a trust fund, taking care not to violate any of the special provisions of other sections of the Code, or trench on the jurisdiction of other tribunals. *Ib.*

4. *Same. Parties. Executor's administrator. Revivor.*

If the executor dies pending suit, it is necessary to revive against his administrator in order to procure the filing of his account or to obtain a personal decree for a *devastavit*. *Ib.*

5. *Same. Successor in administration. Amendment.*

If the assets of the estate have gone to an administrator *de bonis non cum testamento annexo*, he should be made a party to the bill, which, in a proper case, may be done by an amendment. *Ib.*

6. *Federal and State courts. Limitation against assignee.*

If the assignee in bankruptcy, when summoned, fails to appear in the State court, where the judgment creditor's bill is pending, or to take any other step for two years after the assignment to him, he is barred by the limitation of the Bankrupt Act, but the judgment creditor is not, and the State court will subject the land. *Davis v. Lumpkin*, 506.

7. *Same. Jurisdiction. Statute passed pending suit.*

Sect. 711 of the Revised Statutes of the United States, which provides that the jurisdiction of the Federal courts shall be exclusive of the courts of the several States as to all matters and proceedings in bankruptcy, does not affect the creditor's bill filed in the State court before the Revised Statutes were adopted. U. S. Rev. Stats., § 5597. *Ib.*

8. *Chancery practice. Marshalling assets.*

While a prior grantee can compel the judgment creditor to first sell land, subsequently conveyed by the debtor, and equally subject to the lien, he cannot do so if the latter land has been levied on under

prior judgments, and is so involved in litigation that it presents no source even of partial satisfaction. *Ib.*

9. *Same. Pleading. Answer. Denial of statement in bill.*

If the answer to a bill which charges that judgments are paid, refers to the respondent's denial in another case in the same court, that, in the absence of exception, is not, by virtue of Code 1871, § 1024, to be taken at the hearing as an admission of payment. *Ib.*

See FRAUDULENT CONVEYANCE, 3-6; PARTNERSHIP, 6.

### CRIMINAL LAW AND PROCEDURE.

1. *Assault with intent to murder. Fire-arm. Load. Evidence.*

If an indictment for assault with intent to murder charges that the pistol was loaded with gunpowder and leaden bullets, the State must show that it was so loaded as to be capable of producing death; but the fact may be established by circumstantial evidence. *Porter v. State*, 300.

2. *Same. Contents of fire-arm. Instructions.*

An instruction for the accused in such a case, enumerating the circumstances bearing on the question, with the statement that they are insufficient to prove the fact, is defective, unless it states all the circumstances in evidence from which it can be inferred. *Ib.*

3. *Homicide. Witnesses. State's duty to introduce.*

The prosecution in a case of homicide is not bound to introduce all the witnesses of the killing who are marked as State's witnesses and present at the trial. *Morrow v. State*, 836.

4. *Same. Exception to rule. Presumption of law.*

*Semble*, that the prosecution cannot, by introducing a witness to the fact of killing alone, force the accused to introduce State's witnesses to rebut the presumption of murder. *Ib.*

5. *Murder. Fixing penalty. Instructions.*

Under the act of March 4, 1875 (Acts 1875, p. 79), empowering the jury to declare in their verdict, convicting any person of a capital crime, that the punishment shall be imprisonment for life, it is not enough to instruct them of their power, but their verdict will be set aside unless they are informed that, if they do not so declare, the sentence will be that of death. *CHALMERS, J.*, dissented. *Walton v. State*, 538.

6. *Statutes of Jeofails. Constitutional law.*

The statutes (Code 1857, p. 573, art. 7; Code 1871, § 2884; Acts 1878, p. 200) which provide that no verdict in a criminal case shall be annulled for any error or omission occurring before sentence, unless the record shows that objection was made in the lower court, are constitutional. *Ex parte Phillips*, 357.

7. *Same. Defects cured. Collateral attack.*

In the absence of such objection, a sentence is valid in a collateral proceeding, by virtue of those statutes, although the record fails to show an order for summoning a grand jury, or their organization, impaneling, or swearing, or the appointment of a foreman, or the finding or filing of the indictment, or the prisoner's presence. *Ib.*

8. *Same. Objections how reserved. Motion in arrest.*

A recital in such record that the defendant's motion in arrest of judgment was heard and overruled, or a *pro forma* motion in arrest, is not a sufficient objection, under the statutes, to reserve the defects for a collateral attack, but the motion must specify the errors or omissions. *Seem*, that the same is true on error or appeal. *Ib.*

9. *Same. Practice in Circuit Court unaffected.*

The observance of every statutory and common-law rule for the protection of the accused is as essential now as before the statutes were passed. *Ib.*

10. *Same. Presumption of regularity.*

The effect of the statutes is simply to shift the presumption as to the subjects embraced by their language, to which, when the record is silent, the courts are now required to apply the maxim, *Omnia presumuntur rite esse acta*. *Ib.*

11. *Same. Reserving objections. Burden on accused.*

Under the statutes the duty of attacking, in the lower court, the errors and omissions complained of is devolved upon the accused, who, in order to show in this court that he did so attack them, must see that the record properly embodies and sets forth his motions or objections. *Ib.*

12. *Criminal procedure. Special judge.*

The statutory provision (Code 1871, § 536) for the selection by lot of a special judge from among the members of the bar, when the circuit judge is disqualified, is inapplicable to criminal cases. *Butler v. State*, 630.

13. *Same. Challenges of jurors. Joint trial.*

If several persons are jointly tried for felony, each is entitled to four peremptory challenges; and, if all are restricted to four, a conviction of a misdemeanor will be set aside. Code 1871, § 2761. *Smith v. State*, 822.

See ASSAULT; BAIL; CONCEALED WEAPONS; CONSPIRACY; COUNTY CONTRACTOR; EVIDENCE, 2-4; HABEAS CORPUS; HOMICIDE; IMPRISONMENT FOR DEBT; INDICTMENT; JUROR; LARCENY; PERJURY; PRIVILEGE TAX, 4; QUARANTINE; RAPE; REWARD; STATUTE; WITNESS, 1.

### CROSS BILL.

See REVIEW, BILL OF, 7, 11.



## DAMAGES.

See ASSIGNEE IN BANKRUPTCY; ATTACHMENT, 11-16; PLEADING; SLANDER, 3; VENDOR AND VENDEE, 3; VERDICT.

## DECEIT.

1. *False recommendation. Scienter.*

An action for deceit in writing a false statement concerning another, whereby the latter obtained credit, cannot be maintained unless the defendant made the false statement knowingly. *Sims v. Eiland*, 83, 607.

2. *Same. Representation without knowledge.*

A person who represents as a fact that of which he has no knowledge and no well-founded belief, and which is false, is chargeable with having made a false statement knowingly. *Sims v. Eiland*, 607.

3. *Same. Good faith. Honest mistake.*

Persons who write in a letter, simply to introduce the bearer, statements whereby he obtains credit, are not liable in an action for deceit, if they write in good faith the facts as they on sufficient ground believe them to exist, although he subsequently proves untrustworthy. *Ib.*

See SALE, 1-3; VENDOR AND VENDEE, 2, 3.

## DECREE.

1. *Infant. Service of process. Recital.*

A chancery decree for the sale of a minor's land cannot be impeached, in a collateral proceeding, if the order appointing a guardian *ad litem* recites that summons was duly executed on the minor, although the only summons shown by the record was served, not on him, but on a person erroneously styled his guardian. *Cocks v. Simmons*, 183.

2. *Same. Service on parent or guardian. Code 1857, p. 489, art. 64.*

Such a recital in the order renders valid, collaterally, a decree of partition, although the summons was served only on the infant, who had no father or guardian living, as shown by the record, which is silent as to his mother. *Ib.*

3. *Same. Day to show cause. Statutory extension of the rule.*

Sect. 1265, Code 1871, is an extension of the chancery rule which gives time to infants, after attaining majority, to reopen certain decrees. *Sledge v. Boone*, 222.

See CHANCERY, 2, 3; CHANCERY PLEADING, 1-4; CHANCERY PRACTICE, 5-7; ESTATES OF DECEASED PERSONS, 2-4; INFANT; INTEREST; LIMITATION OF ACTIONS, 5; MARRIED WOMAN, 12; REVIEW, BILL OF.

## DEED.

1. *Verbal gift of land. Relation back.*

A verbal gift of land by a father to his daughter soon after her marriage is void, although she takes possession at the time, and his subsequent conveyance, made after he becomes insolvent, will not, as against his creditors, relate back to the time of the gift. *Davis v. Lumpkin*, 506.

2. *Delivery. Retention by grantor. Intention.*

A paper, in the form of a deed of gift, executed at the time of the donation, is ineffectual for want of delivery, although signed and sealed by the donor and his wife, if retained by him, and treated by all the parties as a memorandum from which a deed was afterwards to be drawn. *Ib.*

3. *Same. Intention.*

A deed, although executed and acknowledged, is inoperative, if retained by the grantor, who manifests no intention that it shall be considered as delivered. *Davis v. Williams*, 848.

4. *Same. Unexecuted purpose to deliver.*

Depositing the instrument in a box containing his other papers in a bank, with a written statement enclosed that it is to be handed to the grantees, is not a delivery, if the maker's intention is to fix a time for the title to vest, and he dies without doing so. *Ib.*

5. *Same. Evidence. Competency and sufficiency.*

The delivery of a deed, produced in an action of ejectment by the party who relies thereon, is a question for the jury, and it is erroneous for the court to exclude the deed from their consideration on the ground that it was never delivered. *Cocks v. Simmons*, 183.

6. *Same. Commissioner's deed. Report and confirmation.*

A deed executed and acknowledged by a commissioner, appointed by decree to sell and convey land, is delivered, when the court confirms his report of sale and conveyance, although he retains manual possession of the deed. *Ib.*

7. *Same. Estoppel by record.*

As against a purchaser, who has paid for and is equitably entitled to the land, parties to the record which contains such recitals are estopped to deny the delivery of the deed. *Ib.*

8. *Injunction. Dissolution.*

If such deed is made under a sale by the court, in violation of the terms of an injunction which has previously issued from the same court, the injunction may be regarded as dissolved, in considering the validity of the purchaser's title. *Ib.*

9. *Same. Violation.*

One who is not a party to the injunction bill, cannot complain of such violation of the injunction. *Ib.*

10. *Same. Agreement between counsel.*

An agreement, between the counsel in the two cases, that the commissioner shall hold the deed and the purchaser enough money to answer the injunction suit, does not prevent the title to the land sold from passing to the purchaser. *Ib.*

See ACKNOWLEDGMENT; CONSIDERATION, 1, 2; COVENANT; DEED OF TRUST; FRAUDULENT CONVEYANCE; TAX TITLE, 2-5.

DEED OF TRUST.

1. *Description of chattels. Rule of construction.*

The descriptive words in a deed of trust should be so construed as to sustain the instrument, when it can be done without violence to the language employed. *Draper v. Perkins*, 277.

2. *Same. Ambiguity. Admissibility in evidence.*

A deed of three bales of middling cotton, averaging five hundred pounds each, which the grantor may raise or have cultivated "during the present year on the Burleson or Barker plantation in Tunica County, Mississippi, or elsewhere in said State," is admissible in evidence. *Kelly v. Reid*, 89, cited. *Ib.*

3. *Stipulation to ship cotton or pay commissions.*

A stipulation in a deed of trust executed by a merchant to secure a *bona fide* debt due a cotton factor, that he shall ship a specified amount of cotton to the latter during the year for sale on commission, or pay the commissions if not shipped, is valid. *Chaffe v. Hughes*, 256.

4. *Stipulation as to appropriation of payments.*

If the stipulation comes after the granting and conditional clauses of the deed, which purports to secure nothing but the debt, the commissions are not ordinarily protected; but a further stipulation allowing the factor at any time to apply payments to unsecured debts without impairing the security, protects any indebtedness arising at or before final settlement. *Ib.*

See CHATTEL MORTGAGE; EJECTMENT, 5, 6; FRAUDULENT CONVEYANCE, 10-12; HUSBAND AND WIFE, 4; JUDGMENT LIEN, 2-4.

DELEGATION OF JUDICIAL POWERS.

See MUNICIPAL CORPORATION, 3.

DELIVERY OF DEED.

See DEED, 2-8, 10.

## DEMURRER.

See CHANCERY PLEADING, 2; CHANCERY PRACTICE, 5; COVENANT, 3; LIMITATION OF ACTIONS, 12; PLEADING, 3, 4, 6, 7; PRACTICE, 2, 3; REVIEW, BILL OF, 5; WILL, 5.

## DEPOSITION.

See CHANCERY PRACTICE, 10.

## DESCENT AND DISTRIBUTION.

See ADMINISTRATION; WIDOW.

## DETAINDER.

See UNLAWFUL ENTRY AND DETAINDER.

## DIVORCE.

1. *Cruel treatment. Personal violence.*

Persistently cruel and inhuman treatment, occasionally characterized by personal violence, so as to beget the apprehension that it will occur again whenever fury impels the offender, is, under Code 1871, § 1767, cause for a divorce from the bond of matrimony. *Johns v. Johns*, 530.

2. *Same. Infant children. Custody.*

On granting the divorce, the custody of the infant children of the marriage should be given to the mother, if they are so young as to need her care and attention. *Ib.*

## DOWER.

See UNLAWFUL ENTRY AND DETAINDER, 3; WIDOW.

## DRUGGIST.

*Retailing liquor without prescription. Indictment.*

An indictment under the statutes against a druggist, for selling liquor without the prescription of a physician, must aver that he sold in less quantities than a gallon. *Blakely v. State*, 680.

## DURESS.

See TAX COLLECTOR UNDER CODE 1871, 8.

## EASEMENT.

See PARTY WALL; SPECIFIC PERFORMANCE.

## EJECTMENT.

1. *Mesne profits. Partial improvements.*

In ejectment for a tract of land, only a portion of which the defendant has improved, the jury, in assessing mesne profits and the value of improvements, may deal with the entire tract together, although the defendant claims the improved part under a separate conveyance. *Johnson v. Futch*, 73.

2. *Same. Value of improvements. How assessed.*

The value of improvements should be assessed on a basis coextensive in time with the estimate of rents and profits which they contributed to produce, so as to allow the defendant for all his improvements of which the plaintiff recovers the benefit. *Ib.*

3. *Same. Accruing pending suit. Res adjudicata.*

The plaintiff in ejectment, under Code 1871, ch. 17, recovers mesne profits up to the day of trial; and the judgment in such a suit is a bar to a subsequent action for the mesne profits which accrued pending the suit. *Bell v. Medford*, 31.

4. *Costs. Copies used in evidence.*

The legal fees for copying records and deeds necessary in evidence in such suit are taxable as costs, and, if rejected from the cost bill by the court, cannot be recovered in a subsequent action. *Ib.*

5. *Deed of trust. Outstanding title. Statute of Limitations.*

Recovery by the plaintiff in ejectment cannot be defeated by producing an outstanding deed of trust executed so long ago that the debt secured thereby is barred, and the security inoperative for want of remedy thereon. Code 1871, § 2150; *Griffin v. Sheffield*, 38 Miss. 359, affirmed; *Heard v. Baird*, 40 Miss. 793, overruled; and *Stadeker v. Jones*, 52 Miss. 729, explained. *Freeman v. Cunningham*, 67.

6. *Same. Grantor's and trustee's titles. Privity.*

None but the trustee in a deed of trust, or those claiming under him, can prevent a recovery on the grantor's title. Code 1871, § 2295. And a purchaser at a bankruptcy sale of the husband's title cannot set up a trust-deed, executed by husband and wife on the latter's land, for the purpose of defeating the title of the wife's vendee. *Ib.*

7. *Estoppel. Sale of land. Married woman.*

The wife, in such case, is not estopped to assert her title by failing to object to the bankruptcy sale. *Sulphine v. Dunbar*, 55 Miss. 255; *Staton v. Bryant*, 55 Miss. 261, cited. *Id.*

See CHANCERY, 6; COUNTY TAX, 2; COVENANT, 1; HUSBAND AND WIFE, 4; TAX TITLE, 2-5.

## ELECTIONS.

See CONTESTED ELECTIONS; OFFICE, 2.

## EMINENT DOMAIN.

1. *Certiorari. Jury of inquest.*

*Certiorari* lies to bring up for review the proceedings of an inquest assessing damages under § 17 of the act of Nov. 27, 1865 (Acts 1865, p. 62), for the taking of land for the purpose of constructing a levee on the Mississippi River. *Allen v. Levee Commissioners*, 163.

2. *Same. Verdict. Amendment. Circuit Court.*

The Circuit Court cannot, in such case, amend the verdict of the jury, so as to show the improper principles on which it was based, and enable the land-owner to sue for damages on grounds not embraced therein. *Ib.*

3. *Power of revisory court. Reinvestigation of facts.*

The clause of the statute declaring the verdict final, prevents a reinvestigation of the facts, on return of the *certiorari*, but not an examination of the record. *Ib.*

4. *Record of inquest. Compliance with statute.*

The record of the proceedings of the inquest must show a strict compliance with the statute. *Ib.*

5. *Judgment in revisory court.*

The only judgment which the revisory court can pronounce is of affirmance, if the proceedings are correct; if otherwise, that they be quashed. *Ib.*

See FERRY, 2; MUNICIPAL CORPORATION, 7-10.

## ENGLISH STATUTES.

See PARTITION, 10.

## EPIDEMIC.

See ATTACHMENT, 4; CHANCERY PRACTICE, 4; CIRCUIT CLERK, 3; QUARANTINE.

## EQUITABLE ESTOPPEL.

See ESTOPPEL; PURCHASER IN GOOD FAITH, 1, 2.

## EQUITY.

See CHANCERY.

## ERROR APPARENT.

See CHANCERY PLEADING, 1-4; REVIEW, BILL OF, 1-4, 10.

## ESCAPE.

See HABEAS CORPUS, 2-4; REWARD.

## ESTATES OF DECEASED PERSONS.

1. *Special commissioner to sell land.*

A special commissioner to sell a decedent's land cannot be appointed under the Act of April 1, 1872, amending Code 1871, § 1159 (Acts 1872, p. 27), unless the decedent's estate is insolvent. *Alcorn v. State*, 273.

2. *Insolvency. Decree. Estoppel. Parties.*

If a sale of land under insolvency proceedings is set aside at suit of the heirs who were not made parties thereto, and the purchaser seeks to be subrogated to the rights of the creditors whose claims were allowed and who received dividends, the heirs may show that such claims were barred before the inception of the proceedings. *Sivley v. Summers*, 712.

3. *Same. Original bill to impeach decree. Fraud. Infants.*

If innocent strangers' rights have not attached, a sale of land to pay the debt of an insolvent estate may be set aside by the heirs, some of whom are minors, by original bill in the court which granted the decree, upon the ground that they were not legally served with process. *Ib.*

4. *Same. Recitals in decree. Effect in proceedings direct and collateral.*

In such a case, recitals in the decree for sale as to service of process and proof of publication are only *prima facie* true, and do not cure the absence of a summons and the illegality of the citation, although in a collateral proceeding, as the record could not be contradicted, they would be conclusive. *Crawford v. Redus*, 54 Miss. 700, affirmed. *Ib.*

5. *Same. Probate Court. Void process.*

A summons to appear on a past day gives no jurisdiction, and a probate decree for the sale of land, based thereon, is void. *Hendricks v. Pugh*, 157.

6. *Same. Infants. Notice.*

Minor heirs were not entitled to notice of insolvency proceedings in the Probate Court. *Burrus v. Burrus*, 56 Miss. 92. *Ib.*

7. *Same. Defective service of process. Decrees void and voidable.*  
Defective service of process rendered a decree of insolvency erroneous and voidable, but not void. *Ib.*
8. *Executor and administrator. Appeal. Cost bond. Supersedeas.*  
An executor or administrator is, under Code 1871, § 1183, relieved from giving a bond for *supersedeas*, but must, in order to appeal to the Supreme Court from a decision affecting the estate which he represents, give an appeal bond for the costs. *Campbell v. Doyle*, 292.
9. *Same. Effect of cost bond.*  
When he has given the appeal bond for costs, the executor or administrator has the right to a *supersedeas* of the execution of the judgment or decree appealed from, so far as it affects the estate. *Ib.*
10. *Same. Liability for costs.*  
Under Code 1871, § 1176, judgment for costs *de bonis propriis* may be rendered against an executor or administrator, either in the Supreme or inferior court in a suit against the estate. *Williamson v. Childress*, 26 Miss. 328; *Taylor v. Webb*, 56 Miss. 631, cited. *Ib.*
11. *Same. Judgment for costs. Certificate of probable cause.*  
Code 1871, § 1190, as to the court's certificate of probable cause, applies only to suits in which the executor or administrator is unsuccessful, and relieves him from personal liability only for costs recovered by the adverse party. *Ib.*
12. *Same. Costs incurred.*  
The executor or administrator is liable for the costs which he incurs, as, for instance, his process and witness fees, and the price of a transcript made out for his appeal, without regard to probable cause for bringing or defending the suit, or his success therein. *Ib.*
13. *Same. Chancery jurisdiction. Administrator's bill to recover land.*  
If the estate has not been declared insolvent, the administrator cannot maintain a bill in equity to which the heirs are not parties, to recover land of his intestate, on the allegation that the assets are insufficient to pay the debts. *Ib.*

See CHANCERY CLERK; CONFLICT OF LAWS; CONSIDERATION, 4; CREDITOR'S BILL, 1-5; EXECUTOR AND ADMINISTRATOR; LIMITATION OF ACTIONS, 14-20; PARTITION, 7; PURCHASER IN GOOD FAITH, 1-4; REVIEW, BILL OF, 2, 3, 11, 12; SET-OFF, 4; WITNESS, 2-4.

## ESTOPPEL.

1. *Equitable estoppel. Void execution sale. Charge for purchase-money.*  
The purchaser of a testator's land at a sale under a judgment against



his executor acquires no title, but if, in the belief that he is obtaining one, he pays the purchase-money which is applied to the judgment debt with which the land is charged by the will, a recovery in ejectment by the heirs will be enjoined until he is reimbursed. *McGee v. Wallis*, 638.

2. *Same. Doctrine applicable to sheriff's sale. Improvements.*

The equitable doctrine which, under such circumstances, prevents the holder of the legal title from recovering the land without refunding the purchase-money, like that which compels compensation for improvements put thereon by the purchaser in good faith, is as applicable to a sale under an execution as to one under a decree of court. *Ib.*

3. *Same. Caveat emptor. In what cases applicable.*

No distinction, in this respect, between execution and private sales is established by the maxim *Caveat emptor*, which applies equally to sales by administrators or sheriffs in cases of want of ownership by the defendant in execution or the intestate, but is inapplicable to defects caused by a failure of the sale to pass the title. *Ib.*

See ATTACHMENT, 5, 6; CHANCERY, 6; COUNTY, 2; DEED, 7-10; EJECTMENT, 7; ESTATES OF DECEASED PERSONS, 2-4; EXECUTOR AND ADMINISTRATOR, 6; FRAUDS, STATUTE OF, 2; FRAUDULENT CONVEYANCE, 5; HUSBAND AND WIFE, 3; INFANT, 6; JUSTICE OF THE PEACE; LANDLORD AND TENANT, 2; MARRIED WOMAN, 9; PARTNERSHIP, 8; PARTY WALL, 2; PURCHASER IN GOOD FAITH, 6; TAX COLLECTOR UNDER CODE 1871, 6.

EVIDENCE.

1. *Written instrument. Parol evidence to explain.*

When the date of payment is not expressed in a written lease, it may be fixed by parol evidence, showing the situation and surroundings of the parties. *Hartsell v. Myers*, 135.

2. *Declarations of victim. Res gestæ. Homicide. Poisoning.*

The statements of a poisoned person as to his symptoms, existing at the time he speaks, are admissible in evidence on the trial of the prisoner, but his narrative of what he drank an hour before cannot be proved. *Field v. State*, 474.

3. *Same. Interval after injury.*

Declarations of an injured person are usually incompetent, unless simultaneously with the particular event, but have been admitted in evidence when made very shortly thereafter to the first person offering assistance or inquiring, and before opportunity or motive for fabrication. *Ib.*

4. *Circumstantial evidence. Murder. Threat.*

A threat to kill is insufficient of itself to warrant a conviction of murder, although the killing is soon afterwards done and no other perpetrator is disclosed by the evidence. *Jones v. State*, 684.

5. *Exclusion. New points. Supreme Court.*

The exclusion of evidence in the lower court cannot be sustained, on appeal, upon grounds not shown by the record to have been made below, unless the excluded evidence is inadmissible under all circumstances. *Decell v. Lewenthal*, 331.

See ACCOUNT STATED, 1, 3, 4; ADMINISTRATION BOND, 1, 2; ASSAULT, 1, 2; ATTACHMENT, 2, 5; BAIL, 4, 5; BILL OF EXCHANGE, 1, 5; CHANCERY PLEADING, 3, 4, 7; CHANCERY PRACTICE, 3, 8-10; CHATTEL MORTGAGE, 2; CONSIDERATION, 1-3; CRIMINAL LAW AND PROCEDURE, 1; DEED, 5; DEED OF TRUST, 2; INSTRUCTIONS, 2, 3; JUROR, 5; LARCENY; LIBEL, 1; LIFE INSURANCE, 1-4; MARRIED WOMAN, 12; NEW TRIAL, 1-5; PERJURY; PROBATE COURT AND PROCEEDINGS, 3; RECEIPT; SLANDER, 1, 2; TAX TITLE, 2-5; TRUST AND TRUSTEE, 4; VARIANCE; WILL, 5-7; WITNESS.

## EXCEPTIONS.

See BILL OF EXCEPTIONS.

## EXECUTION.

See CIRCUIT CLERK; EXECUTION SALE; JUDGMENT, 2; JUDGMENT LIEN, 1-3, 5; LANDLORD AND TENANT, 3, 4; SHERIFF.

## EXECUTION SALE.

*Interest of vendor by title-bond.*

The interest in land which the vendor by title-bond has, where part of the purchase-money has been paid by the vendee in possession, is not salable under execution, and the purchaser from the sheriff cannot by bill in equity ascertain and subject such interest. *Bell v. Flaherty*, 45 Miss. 694, criticised. *Chisholm v. Andrews*, 636.

See ESTOPPEL; JUDGMENT LIEN, 1-3.

## EXECUTOR AND ADMINISTRATOR.

1. *Removal and resignation. Successor, when appointed.*

An administrator *de bonis non cum testamento anneo* can be appointed on the removal of an executor or his resignation, without notice to the legatees and without waiting for the final settlement, which terminates liability on the executor's bond. Code 1871, § 1122. *Sivley v. Summers*, 712.

2. *Negligence. Debts due estate. Debtor's non-residence.*

An accommodation acceptor's executor, who pays the bill of exchange, and fails to sue the drawer, is not relieved from liability to the heirs for loss of the debt by the fact that the drawer resides in another State. *Klein v. French*, 662.

3. *Same. Excuse. Legal advice. Suppression of facts.*

Such executor is not excused from suing by the fact that a lawyer to whom he sent the bill for collection, but who was not notified that the executor had paid it as the acceptor's representative within the statutory period, advised him that the action was barred on its face. *Ib.*

4. *Conflict of laws. Suit in foreign jurisdiction.*

If the domiciliary administrator or executor has possession of a note payable to the decedent or bearer, or if he has paid the decedent's accommodation acceptance of a bill of exchange, he may sue, in his own name, in a foreign jurisdiction. *Ib.*

5. *Conversion of debt. Costs and attorney's fee.*

In such case, suing in his own name is no evidence of conversion, but a rightful exercise of power for the benefit of the estate, from which the executor should be allowed costs and attorney's fees if he fails to maintain the action. *Ib.*

6. *Improper compromise. Estoppel to deny power.*

After the executor has taken possession of such paper and compromised it, without consulting the heirs or notifying them that he has no power to act, he cannot avoid liability for loss occasioned thereby, upon the ground that he could acquire no such power. *Ib.*

7. *Negligence. Good faith. Renting houses.*

An executor who acts in good faith in fixing the rent of houses belonging to the estate and gets all he can from the tenants, whose places if they vacate he has good ground to apprehend cannot be filled, is not liable for more than he receives, although witnesses twelve years afterwards think he might have obtained a higher rent. *Ib.*

See ADMINISTRATION BOND; CONFLICT OF LAWS; CREDITOR'S BILL, 1-5; ESTATES OF DECEASED PERSONS, 8-13; JUDGMENT; LIMITATION OF ACTIONS, 14-19; PROBATE COURT AND PROCEEDINGS, 2; PURCHASER IN GOOD FAITH, 1-4; REVIEW, BILL OF, 2, 3; SET-OFF, 4; WILL, 3; WITNESS, 2-4.

## EXECUTORY BEQUEST.

See BEQUEST.

## EXEMPT PROPERTY.

See CONSPIRACY.

## EXHUMATION OF DEAD BODY.

See LIFE INSURANCE, 2.

## FAMILY SUPPLIES.

See AMENDMENT, 1; MARRIED WOMAN, 5, 7, 11, 12.

## FEDERAL AND STATE COURTS.

See CREDITOR'S BILL, 6, 7; JUDGMENT LIEN, 5, 6.

## FERRY.

1. *Franchise. Prescription.*

The owner of both banks of a river, who has for thirty years kept a ferry without license from the board of supervisors of the county, has by prescription the absolute property in the franchise. *Supervisors v. McFadden*, 618.

2. *Power of board of supervisors. Eminent domain.*

The right of eminent domain, by virtue whereof the State may appropriate the franchise to the public use on due compensation, cannot, in the absence of legislative grant, be exercised by the board of supervisors. *Ib.*

3. *Same. Roads, bridges and causeways.*

The franchise is not the kind of property which the board of supervisors can condemn under the statute authorizing the appropriation of land for public roads, and timber for bridges and causeways. *Ib.*

4. *Same. Free ferries.*

Under the statutory grant of power over ferries, the board of supervisors may license and regulate ferries kept by other persons, but cannot establish a free ferry at the expense of the county. *Ib.*

5. *Same. Injunction.*

The owner of the ferry is entitled to a perpetual injunction by a court of chancery against the execution of the orders of the board of supervisors appropriating his franchise and establishing the free ferry. *Ib.*

## FIRE LIMITS.

See MUNICIPAL CORPORATION, 2.

## FLOURING MILL.

See MUNICIPAL CORPORATION, 18, 19.

## FORCIBLE ENTRY.

See UNLAWFUL ENTRY AND DETAINER.

## FORECLOSURE.

See JUDGMENT LIEN, 8; MARRIED WOMAN, 6.

## FORGERY.

See BILL OF EXCHANGE, 6.

## FRANCHISE.

See FERRY.

## FRAUD.

See ATTACHMENT, 1-10; BILL OF EXCEPTIONS, 2; CHANCERY PLEADING, 4; CHANCERY PRACTICE, 4; CIRCUIT CLERK; CONSPIRACY; DECEIT; DEED, 1; ESTATE OF DECEASED PERSONS, 3; FRAUDULENT CONVEYANCE; MUNICIPAL CORPORATION, 15, 16; SALE, 1-3; VENDOR AND VENDEE, 2, 3.

## FRAUDS, STATUTE OF.

1. *Conveyance of contract for land.*

Two persons, each of whom owns and occupies a tract of land under a bond for title, cannot, under the Statute of Frauds, exchange the tracts by surrendering them and delivering the respective title-bonds to each other. *Connor v. Tippet*, 594.

2. *Same. Estoppel. Restoration of status quo.*

*Quære*, whether one of the persons can enjoin the other from asserting title to the land which he surrendered, upon the ground that he has disposed of that which he received. *Ib.*

3. *Sale. Essentials.*

A verbal sale, without a memorandum, of more than fifty dollars worth of cotton, is invalid, under the Statute of Frauds, against a subsequent attachment, unless part of the price is paid or part of the cotton delivered. *Moore v. Love*, 765.

4. *Same. Delivery of samples. Part of bulk.*

Delivery of samples is a compliance with the statute, only when they are treated by both parties as part of the goods sold, and as diminishing the quantity or weight thereof to the extent of their bulk. *Ib.*

5. *Same. Mere specimens. Question of fact. Burden of proof.*

Whether the samples are so regarded is a question of fact, and the bur-

den of establishing the affirmative rests upon the party who asserts it, and, if they are treated as specimens only, their delivery does not satisfy the statute. *Ib.*

See VENDOR AND VENDEE, 2, 3.

### FRAUDULENT CONVEYANCE.

1. *Prior creditors. Judgment lien.*

If a father, after he becomes insolvent, makes a voluntary conveyance to his daughter, it is void as against existing creditors, and the land conveyed is subject to their judgments subsequently obtained against the grantor. *Davis v. Lumpkin*, 506.

2. *Same. Partnership. Arbitration.*

If partners submit the firm account for settlement to arbitrators, who decide that certain partnership debts shall be paid by one partner, he becomes, from the date of the award, a debtor to his copartner, within the purview of the statute against fraudulent conveyances. *Swan v. Smith*, 548.

3. *Same. Judgment creditor. Principal and surety. Subrogation.*

When a partner pays the judgments obtained by the firm creditors on the claims which by the award were to be settled by his copartner, the former is a judgment creditor and can maintain a bill to vacate a fraudulent conveyance executed by the latter. *Ib.*

4. *Chancery practice. Prevention of multiplicity of suits.*

A bill filed when the complainant has only arranged to pay the judgment cannot be maintained, although he pays it before the hearing; but if before suit he has paid the other judgment which is embraced in the bill, the amount paid pending the suit may be embodied in the decree. *Ib.*

5. *Same. Suit to vacate. Judgment. Estoppel.*

If, under the award, a partner executes his due bill to his copartner, on which the latter obtains judgment, the former cannot set up, in the suit to vacate his fraudulent conveyance, frauds in the arbitration, of which he knew before judgment and failed without reason to assert. *Ib.*

6. *Same. Priority of liens. Costs of suit.*

Strangers who have paid off valid incumbrances upon the property fraudulently conveyed are entitled to be reimbursed; and if made parties defendant to the bill by amendment, they should be protected by the decree which orders the sale of the land. *Ib.*

7. *Preference. Reservation to debtor.*

Security for a pre-existing indebtedness is void as to creditors, if it reserves an advantage inconsistent with its avowed purpose, or an unusual indulgence to the debtor, although the secured creditor has no notice of the fraudulent intent. *Thompson v. Furr*, 478.

8. *Same. Notice to grantee. Valuable consideration.*

A grantee who accepts such a conveyance with knowledge of its character, or has reasonable ground to suspect it, forfeits its advantages, although the consideration may be meritorious. *Ib.*

9. *Same. Notice of fraud.*

A creditor cannot, as against other existing creditors, accept as collateral security for a pre-existing debt the benefit of the debtor's fraudulent conveyance to a third person, if he has reason to suspect its character. *Ib.*

10. *Same. Badges of fraud.*

A deed of trust made by a debtor, against whom a suit for a large amount is pending, just before judgment, to secure pre-existing debts due his relatives and friends, is valid, although hastily recorded, where the grantor owns property, before the judgment can be enrolled. *Surget v. Boyd*, 485.

11. *Same. Fictitious debt. Reservation to grantor.*

Unless such security is a sham never to be enforced, other creditors can vacate it only by showing that the secured debts are simulated or that some benefit is reserved to the grantor. *Ib.*

12. *Same. Security for pre-existing debt. Purchaser for value.*

Security for a pre-existing debt, without a new consideration, does not, like a purchase for value, cut off secret equities and frauds; but, unless they are shown to exist, the recipient is equally entitled to protection. *Harney v. Pack*, 4 S. & M. 229; *Pope v. Pope*, 40 Miss. 516, and *Perkins v. Swank*, 43 Miss. 349, explained. *Ib.*

See DEED, 1; JUDGMENT LIEN, 5, 6.

## FRAUDULENT REPRESENTATIONS.

See DECEIT; SALE, 1-3.

## FREEHOLDER.

See ATTACHMENT, 19; JUROR, 1-3; VENUE.

## GARNISHMENT.

*Duties and liabilities of garnishee. Amending answer.*

A garnishee who, after answering that he owes negotiable notes, has notice that they were assigned before the garnishment, unless he amends his answer by stating the assignment, is not protected against the assignee by the recovery in the garnishment proceeding, but subjects himself to double payment of the debt. *Lewis v. Dunlop*, 130.

See ASSIGNMENT, 1; ATTACHMENT, 19, 20.

## GIFT.

See COUNTY, 1; DEED, 1, 2.

## GUARANTY.

1. *Accommodation indorser. Future advances. Assignment.*

An accommodation indorser to order of a promissory note payable to his order given to a commercial firm for supplies to be furnished the maker is liable for advances so made by a new firm created by the death of one partner and the admission of another, to which the assets and business of the original partnership are transferred: *aliter*, in case of an unassignable contract, such as a personal letter of credit. *Greer v. Bush*, 575.

2. *Same. Balance due. Advances after maturity.*

Although the payments exceed the face of the note, the indorser, such being the contract, is liable for the balance due at the maturity of the note, but not for advances subsequently made. *Ib.*

3. *Same. Payment. Delivery of mortgaged property.*

Cotton embraced in a mortgage executed by the maker to the firm to secure the note, although delivered by the former to the latter, cannot be claimed by the indorser as a payment, if the firm, without knowing that it was the mortgaged cotton, gave the maker its full value. *Ib.*

See BOND.

## GUARDIAN AD LITEM.

See DECREE, 1, 2; INFANT, 7.

## GUARDIAN AND WARD.

1. *Removal of guardian for defective bond. Default essential.*

An order that a guardian is removed if he fails to give a new bond in a specified time is void; he must have an opportunity to comply with the requirement before the order of removal is made. *Fant v. McGowan*, 779.

2. *Same. Sale of land. Title. Purchaser's rights.*

The title to land subsequently sold by such guardian, under decree of the court, is good, and the purchaser cannot avoid paying the price by pleading the order of removal. *Ib.*

See AMENDMENT, 2; CHANCERY PLEADING, 2; DECREE, 1, 2; PROBATE COURT AND PROCEEDINGS.



HABEAS CORPUS.

1. *Convict. Void sentence.*

Notwithstanding Code 1871, § 1397, which declares that the writ of *habeas corpus* shall not apply to a person imprisoned under lawful judgment, a convict in the penitentiary is entitled to be discharged on that proceeding if the record of his trial is so fatally defective as to render the sentence a nullity. *Ex parte Phillips*, 357.

2. *Same. Escape.*

If a convict, who sues out a writ of *habeas corpus* to obtain his release from the penitentiary, escapes before the hearing thereof, the proceeding should be dismissed. *Ex parte Walker*, 53 Miss. 866, cited. *Hamilton v. Flowers*, 14.

3. *Same. Subpœna for witness. How issued.*

A subpoena for a witness issued in such a case without the Chancellor's order is sufficient to support a fine for non-attendance, if sent out by the circuit clerk from whom, under the Chancellor's fiat, the writ of *habeas corpus* emanates, and at the court-house of whose county it is returnable. *Ib.*

4. *Same. Defaulting witness. Fine.*

But no fine should be imposed for such relator's benefit; and if judgment for non-attendance be entered against the witness, the proceeding will not be retained to enable the relator to collect it. *Ib.*

5. *Practice. False return. Continuance.*

Practice in *habeas corpus* cases, where there is reason to doubt the return, discussed, with rules as to continuances. *Ib.*

See BAIL, 4, 5; CONTESTED ELECTIONS, 1; COUNTY CONTRACTOR, 3.

HEIR.

See CONSIDERATION, 4; ESTATES OF DECEASED PERSONS, 2-4, 6, 13; LIMITATION OF ACTIONS, 14; PURCHASER IN GOOD FAITH, 1-4.

HINDS COUNTY.

See COUNTY TAX.

HOMESTEAD EXEMPTION.

See WIDOW, 2.

HOMICIDE.

*Express malice. New provocation.*

If a man, on a casual meeting, is assaulted by another, towards whom he bears malice, and kills him with a deadly weapon, the jury must

determine whether the act was induced by the assault or by malice.  
*Cannon v. State*, 147.

See CRIMINAL LAW AND PROCEDURE, 3, 4; EVIDENCE, 2, 3.

### HOUSEHOLDER.

See ATTACHMENT, 19; JUROR, 1-3; VENUE.

### HUSBAND AND WIFE.

1. *Wife's separate estate. Conveyance.*

If a wife's land is bargained in part consideration for land deeded her husband, her subsequent conveyance thereof to a vendee of her husband's grantor binds her, although she devotes the price to pay the balance due from her husband to such grantor. *Hobson v. Edwards*, 128.

2. *Resulting trust. Labor of wife's slaves.*

A trust in land purchased by the husband does not result in the wife's favor, under Code 1871, § 1779, from the fact that her slaves cut on his land the wood which paid for it. *Kenneday v. Price*, 771.

3. *Same. Estoppel.*

The wife is estopped to assert such trust against grantees without notice to whom she and her husband have conveyed his legal title. *Ib.*

4. *Deed of trust. Ejectment by beneficiary.*

If the trustee in a deed of trust by a married woman to secure her husband's debt has sold the land to the beneficiary, the latter can maintain ejectment. *Stephenson v. Miller*, 48.

5. *Mortgage for husband's debt. Rights of mortgagee.*

The beneficiary, when in possession, is entitled only to the income until payment of the debt, or the death of the woman. *Ib.*

6. *Mortgagee in possession. Account. Redemption.*

The married woman can maintain a bill to redeem, or for an account against such beneficiary in possession. *Ib.*

See DIVORCE; EJECTMENT, 6, 7; MARRIAGE; MARRIED WOMAN; UNLAWFUL COHABITATION; WITNESS, 1.

### HYPOTHETICAL CASE.

See INSTRUCTIONS, 2.

### ILLEGALITY.

See INJUNCTION BOND; PRIVILEGE TAX; PROMISSORY NOTE, 2, 4.

## IMPRISONMENT FOR DEBT.

1. *Costs of prosecution.*

Costs of criminal prosecutions are not debts within the meaning of that provision of the State Constitution (Const., art. 1, § 11) which prohibits imprisonment for debt; and the statute (Acts 1878, pp. 164, 169, § 12) which provides that convicts shall be held at labor until they pay them, is valid. *Ex parte Meyer*, 85.

2. *Costs of defence.*

The statute does not contemplate the detention of prisoners for the costs of their defence, but only for those of the prosecution. *Ib.*

## IMPROVEMENTS.

See EJECTMENT, 1, 2; ESTOPPEL, 2; MUNICIPAL CORPORATION, 1-14; PARTITION, 8; PURCHASER IN GOOD FAITH, 2.

## INDEMNITY.

See BOND; GUARANTY.

## INDICTMENT.

1. *Joining offences. Burglary. Assault and battery.*

A charge for an assault and battery committed in a house which is broken and entered may be joined in the count for burglary without rendering the indictment double. *Smith v. State*, 822.

2. *Finding and presentment. Entry.*

The fact that a general minute entry and indorsements on an indictment correspond in number, date of filing, and the name of the foreman of the grand jury, is sufficient to identify the indictment. *Cannon v. State*, 147.

3. *Return by grand jury. Entry on minutes. Filing.*

If an indictment has been returned by the grand jury, and marked "filed" by the clerk, while the accused is at large, the entry of its return may, under Code 1871, § 2795, be made upon the minutes at any time after his appearance. *Cook v. State*, 654.

4. *Same. Statute dispensing with entry. Effect on pending prosecution.*

Such entry is, however, unnecessary, if the indictment was pending and marked "filed" at the time of the passage of the amendatory act of Feb. 6, 1878 (Acts 1878, p. 199), which makes the filing of the indictment evidence of its return. *Ib.*

See ASSAULT, 1, 3; CRIMINAL LAW AND PROCEDURE, 1, 2; DRUGGIST; PERJURY, 4, 7; QUARANTINE; RAPE.

## INDORSEMENT.

See BILL OF EXCHANGE, 6; GUARANTY.

## INFANT.

1. *Necessaries. Counsel fees. Exceptional case.*

An infant is not generally bound for counsel fees as necessities; but where there is no guardian, the infant's estate is liable for the fees of counsel whose services contributed to secure it. *Epperson v. Nugent*, 45.

2. *Same. Chancery. Jurisdiction.*

The Chancery Court in which a guardian is subsequently appointed has, under our system (Const., art. 6, § 16; Code 1871, § 976), jurisdiction of a petition to ascertain proper compensation, and decree its payment out of the infant's estate. *Ib.*

3. *Same. Plantation supplies.*

The necessities for which an infant can bind himself are personal, and, if he is engaged in planting on his own account, he is not bound for supplies furnished him necessary to the occupation. *Decell v. Leventhal*, 331.

4. *Same. Mixed question of law and fact.*

The court determines whether the articles fall within the class of necessities suitable to one in the infant's condition in life, and the jury, whether they are actually necessary under the circumstances of the case. *Ib.*

5. *Same. Classification of articles. Need otherwise supplied.*

As a matter of law, tobacco, bagging, ties, and cash for cotton-picking, are not necessities; and if the infant boards with his father, who supplies him, provisions are not, for the articles must be not only of suitable kind but also actually needed. *Ib.*

6. *Purchase. Estoppel to disaffirm.*

An infant entitled to an eighth of the purchase-money of land, who, at a sale to enforce the vendor's lien, purchases with the seven others, cannot so repudiate his purchase as to avoid a subsequent sale of the land, made under partition proceedings between the eight purchasers. *Cocks v. Simmons*, 183.

7. *Res adjudicata. Negligence of guardian ad litem.*

An infant defendant is concluded by the decree enforcing a vendor's lien on his land, although he had a title which his guardian *ad litem* failed to assert. *Ib.*

See CHANCERY, 1; CHANCERY PLEADING, 1-4; DECREE; ESTATES OF DECEASED PERSONS, 3, 6; PARTITION, 7; PROBATE COURT AND PROCEEDINGS.

## INJUNCTION.

See CONTESTED ELECTIONS, 1-5, 12; DEED, 8, 9; FERRY, 5; INJUNCTION BOND; JURISDICTION; OBSTRUCTION TO WATERCOURSE, 2; PARTY WALL, 2.

## INJUNCTION BOND.

1. *Illegal condition. Breach. Extent of recovery.*  
Indemnity for breach of an injunction bond, which is broader than the statute requires, may be allowed so far as the condition is legal, but not beyond what could be recovered if the bond conformed to law. *Menken v. Frank*, 732.
2. *Same. Bond not vitiated. Recovery how limited.*  
The bond is not vitiated by the excess in the condition, but no recovery can be had for a breach of that part of the condition which is not according to the statute providing for such bond. *Ib.*
3. *Same. Remedy in equity.*  
The obligees may recover in equity, to the same extent that they would have been entitled to recover on the bond at law, if it had been conditioned as prescribed by the statute. *Ib.*

## INQUEST.

See EMINENT DOMAIN.

## INSOLVENCY.

See BANKRUPTCY; ESTATES OF DECEASED PERSONS, 1-7, 13; FRAUDULENT CONVEYANCE; LIMITATION OF ACTIONS, 14; PURCHASER IN GOOD FAITH, 1-4.

## INSTRUCTIONS.

1. *Supreme Court. Immaterial error.*  
Erroneous charges are no ground for reversal, if more favorable to the plaintiff in error than the law warrants. *Darcy v. Spivey*, 527.
2. *Hypothetical statement.*  
An instruction stating a hypothetical case, which the evidence tends to prove, is not obnoxious to the criticism that it assumes the existence of the facts. *Jones v. Edwards*, 28.
3. *As in case of nonsuit. When granted.*  
An instruction to find for the defendant, if the jury believe all the evidence, is proper only where all the facts in evidence being taken as true, every just inference from them fails to maintain the issue, the conflict being resolved most favorably for the plaintiff. *Carson v. Leathers*, 650.

See CONCEALED WEAPONS, 2; CRIMINAL LAW AND PROCEDURE, 2, 5; PERJURY, 5, 6.

## INSURANCE.

See LIFE INSURANCE.

## INTENTION.

See ASSAULT, 2-4; DEED, 2-4; HOMICIDE; LIBEL; PERJURY, 4; WILL, 6.

## INTEREST.

*Decree. Excessive rate.*

A final decree foreclosing a lien on land for the purchase-money is erroneous if it provides that the sum due shall bear interest at ten per cent per annum, when there is nothing to show that the debt bore more than six per cent. *Robison v. Miller*, 237.

See LIFE INSURANCE, 5; PURCHASER IN GOOD FAITH, 6; TENDER.

## INTERPLEADER.

See ATTACHMENT, 20; GARNISHMENT.

## INTOXICATING LIQUORS.

See DRUGGIST; PROMISSORY NOTE, 2-4.

## JEOFAILS, STATUTE OF.

See CIRCUIT COURT, 3; CRIMINAL LAW AND PROCEDURE, 6-11.

## JOINT TENANTS.

See CHANCERY, 1; PARTITION.

## JOINT TRIAL.

See CRIMINAL LAW AND PROCEDURE, 13.

## JUDGE.

See CRIMINAL LAW AND PROCEDURE, 12.

## JUDGMENT.

1. *Statute of Limitations. Revivor by scire facias.*

A judgment against an administrator can be revived by *scire facias* against the administrator *de bonis non*, more than seven years after its rendition, but less than that time after the issuance of execution. *Stilk v. Parham*, 289.

2. *Same. Right to execution. When barred.*

The right of a judgment creditor to enforce his judgment by execution is never barred if he does not permit seven years to elapse without an effort to do so by execution. *Ib.*

8. *Same. Lien. Action of debt. New judgment and lien.*

A judgment ceases to be a lien, and an action of debt thereon is barred in seven years; but by bringing such action within that time, a lien may be had after seven years. *Ib.*

See ACCORD AND SATISFACTION, 3; AGRICULTURAL LIEN, 2-4, 7, 15; ATTACHMENT, 20; BAIL, 5; CHANCERY, 6; COUNTY; CREDITOR'S BILL; EJECTMENT, 3; EMINENT DOMAIN, 5; FRAUDULENT CONVEYANCE, 3-5; GARNISHMENT; JUDGMENT LIEN; MARRIED WOMAN, 15-17; NEW TRIAL, 8; PRACTICE, 2, 5; SUPREME COURT, 2-4; UNLAWFUL ENTRY AND DETAINER, 1-3.

### JUDGMENT LIEN.

1. *Execution. Land formerly owned by debtor.*

A purchaser of land at an execution sale, under a judgment rendered after the debtor has parted with all interest therein, acquires no title. *Gardner v. McManus*, 647.

2. *Deed of trust. Conveyance of equity of redemption.*

The debtor's conveyance, after condition broken, to a grantee with notice of a prior unrecorded deed of trust, carries the title subject thereto. *Ib.*

3. *Same. Subsequent foreclosure. Res inter alios acta.*

The subordination of the title of the debtor's grantee, by the creditor foreclosing his trust-deed, gives no title to the execution purchaser without notice. *Ib.*

4. *Same. Beneficiary's interest.*

The interest of the beneficiary in a deed of trust executed to secure a debt is not the subject of a judgment lien. *Beckett v. Dean*, 232.

5. *Bankruptcy of debtor. Execution.*

Neither the bankruptcy and discharge of the judgment debtor, nor the appointment of an assignee and the assignment to him, affect the lien on the land of the judgment in the State court, or hinder its enforcement by execution. *Davis v. Lumpkin*, 506.

6. *Jurisdiction of Federal and State courts. Assignee's rights.*

The assignee has the right to take the matter into the Bankruptcy Court, but if the judgment calls for more than the land is worth, and he declines to assert his right, the State courts may proceed to enforce the lien, without invading the jurisdiction of the Federal courts, or contravening the bankrupt law. *Ib.*

See CREDITOR'S BILL, 6-9; FRAUDULENT CONVEYANCE, 1.

## JUDICIAL DISCRETION.

*Practice. Continuance.*

It is no abuse of judicial discretion to refuse an application for continuance on the ground of the absence of material witnesses, who have never been notified to appear, and whose attendance is not stated to be expected at the next term. *Grangers' Ins. Co. v. Brown*, 308.

See BAIL, 3; CHANCERY PRACTICE, 6.

## JUDICIAL EXPENSES.

See COUNTY CONTRACTORS.

## JUDICIAL SALE.

See GUARDIAN AND WARD, 2; JUDGMENT LIEN; MARRIED WOMAN, 15-17; PURCHASER IN GOOD FAITH, 1-4.

## JURISDICTION.

1. *Contempt. Punishment.*

One who violates an order of court which has jurisdiction of the person and subject-matter is liable to punishment, from which no other tribunal can relieve him. *Ex parte Wimberly*, 437.

2. *Same. Character of want of jurisdiction.*

Want of jurisdiction, which renders the order void, is not such as is evolved from a development of the case, but such as is manifest *ab initio*, as, for instance, failure or inability to give the parties legal notice, or incapacity, in any aspect, to consider the subject-matter. *Ib.*

3. *Injunction. Actions at law. Prosecutions. Extraordinary remedies.*

There are classes of cases, such as criminal prosecutions, actions of mandamus, and writs of prohibition, in which the general jurisdiction of the Chancery Court, to enjoin actions at law, does not exist, and, if attempted to be exercised by the court, its orders are void. *Ib.*

See AGRICULTURAL LIEN, 2-4, 11, 12; ATTACHMENT, 18, 19; BOARD OF SUPERVISORS, 2; CHANCERY, 1-5; CIRCUIT COURT, 1; CONTESTED ELECTIONS; COUNTY; CREDITOR'S BILL, 1-4, 7; ESTATES OF DECEASED PERSONS, 18; INFANT, 2; JUDGMENT LIEN, 6; JUSTICE OF THE PEACE; OBSTRUCTION TO WATERCOURSE, 5; PARTITION, 1; PROBATE COURT AND PROCEEDINGS, 1; SUPREME COURT; UNLAWFUL ENTRY AND DETAINER, 2.



## JUROR.

1. *Householder. Property qualification.*

Sect. 724, Code 1871, providing that male citizens who are householders shall be competent jurors, is not in conflict with Const., art. 1, § 18, which directs that no property qualification shall ever be required of any person to become a juror. *Nelson v. State*, 286.

2. *Same. Meaning of the term.*

The term "householder" in the statute refers to the civil status of the person, and not to his property, and requires that he shall occupy the position of chief in a domestic establishment, though he need be neither a husband nor a father. *Ib.*

3. *Same. What constitutes.*

The fact that a juror has a rented store in which he sleeps does not constitute him a householder, within the meaning of the statute (Code, 1871, § 724) prescribing the qualifications necessary to sit on juries. *Nelson v. State*, 286, cited. *Brown v. State*, 424.

4. *Competency. Opinion. Bias.*

No person is a competent juror who has a settled opinion as to the existence of a fact, so connected and usually associated with the main fact in issue that it is difficult to disbelieve the coexistence of the latter. *Ib.*

5. *Same. Capital punishment. Scruples.*

A juror who will not, on circumstantial evidence, convict a murderer to be hanged, may be rejected by the court in a case depending upon evidence of that character, although he will convict and send to the penitentiary for life. *Jones v. State*, 684.

6. *Same. Challenge. Curing error.*

The defendant's clerk is an incompetent juror; and his peremptory challenge will not cure the erroneous overruling of objection to him, if the plaintiff's challenges are exhausted before the panel is completed. *Hubbard v. Rulledge*, 7.

7. *Same. Challenge. Curing error.*

The erroneous overruling of a challenge for cause, if the prisoner afterwards peremptorily challenges the juror, is no ground for reversal, unless prejudice is shown; as, for instance, by the exhausting of the peremptory challenges before the panel is complete. *Brown v. State*, 424.

8. *Same. Incompetency. When ground for new trial.*

If, however, the prisoner does not exercise his right of peremptory challenge, and the incompetent juror, under the erroneous ruling, is sworn and acts on the jury, the prisoner's legal rights are invaded, and the verdict will be set aside. *Ib.*

9. *Same. Prejudice. New trial.*

A conviction will be set aside, if a juror, who has, unknown to the

accused, prejudged the case against him, states, on his *voir dire*, that he is unbiassed. *Cannon v. State*, 147.

See CRIMINAL LAW AND PROCEDURE, 5, 13; PERJURY, 1; SLANDER, 2.

### JURY.

See ACCOUNT STATED, 3; CONCEALED WEAPONS, 2; CRIMINAL LAW AND PROCEDURE, 5, 13; DEED, 5; EMINENT DOMAIN, 1-3; INFANT, 4; JUROR; VERDICT.

### JUSTICE OF THE PEACE.

*Disqualification by interest. Practice. Estoppel.*

Parties to a suit pending before a justice of the peace who is interested in the result cannot, after they have obtained the substantial benefit of Code 1871, § 1340, by consenting to call in another justice who decides against them, object in the Circuit Court that he had no jurisdiction. *Cross v. Levy*, 634.

See AGRICULTURAL LIEN, 1-4, 11; APPEAL, 3; CONTESTED ELECTIONS; OBSTRUCTION TO WATERCOURSE, 3, 4; VENUE, 1.

### LACHES.

See PRACTICE, 4.

### LANDLORD AND TENANT.

1. *Holding over. Liability for rent.*

If a man who has been a tenant for years, continues after the expiration of his lease to occupy the demised premises without a new contract, he is liable as a tenant from year to year at the same rate that he paid. *Love v. Law*, 596.

2. *Same. Defence of adverse title. Estoppel.*

Such a tenant cannot, when sued for the rent, set up an adverse title in his wife, to defeat the landlord's claim. *Ib.*

3. *Levy on tenant's goods. No apportionment of rent.*

When chattels on leased premises are seized by the tenant's creditor, the landlord, by virtue of Code 1871, § 852, is entitled to receive the rent for all the time contracted for, not exceeding one year, whether the day of payment has come or not. *Shanks v. Town Council*, 168.

4. *Same. Liability of sheriff.*

The officer, who makes the levy, is liable, if he takes the property without paying or tendering the landlord the rent. *Ib.*

5. *Lease from stranger. Payment of rent.*

A lessee from the vendor of land does not, by paying the rent to the vendor, relieve himself from liability therefor to the vendee. *Johnson v. Futch*, 73.

See AGRICULTURAL LIEN, 8-10; EVIDENCE, 1; UNLAWFUL ENTRY AND DETAINER, 4.

LARCENY.

1. *Possession of the property. Explanation of accused.*

The explanation made by a person contemporaneously with, or when first required by the circumstances to account for, his recent possession of stolen property is admissible in evidence to rebut the presumption of guilt arising therefrom. *Payne v. State*, 348.

2. *Same. State's failure to disprove explanation.*

If the State fails to rebut the explanation when the means of doing so is peculiarly within its power, the jury should give it such weight as its inherent probability, with such failure, entitles it to receive. *Ib.*

LEASE.

See EVIDENCE, 1; LANDLORD AND TENANT.

LEGACY.

See BEQUEST; WILL.

LEGISLATURE.

See STATUTE, 1.

LEVEE.

See EMINENT DOMAIN; OBSTRUCTION TO WATERCOURSE.

LEVY.

See LANDLORD AND TENANT, 3, 4.

LIBEL.

1. *Privileged communication. Relevancy of evidence.*

In a suit by one merchant against another for libel, in writing that the plaintiff burned his store for the insurance money, if the defence is the honest motive, the defendant, who has denied malice, may be cross-examined as to the effect of the plaintiff's business on his. *Hubbard v. Rulledge*, 7.

2. *Same. Occasion. Information and advice. Justification. Belief.*

In such case, the plaintiff is entitled to recover if the defendant wrote to injure him in business; *aliter*, if, believing on good ground the statement to be true, he wrote in good faith to protect the insurance company. *Ib.*

See MALICIOUS PROSECUTION; SLANDER.

### LIEN.

See AGRICULTURAL LIEN; ATTORNEY AND CLIENT; FRAUDULENT CONVEYANCE, 1, 6; INFANT, 6, 7; INTEREST; JUDGMENT, 3; JUDGMENT LIEN; PURCHASER IN GOOD FAITH, 3, 4; REVIEW, BILL OF, 10, 11; VENDOR AND VENDEE, 1.

### LIFE INSURANCE.

1. *Applicant's answers. Falsity. Burden of proof.*

If a suit on a life-insurance policy is defended on the ground that the deceased falsely answered in his application the question whether he had ever received a serious personal injury, the assured need not prove the answer true, though it is a warranty; but the company must show that it is false. *Grangers' Ins. Co. v. Brown*, 308.

2. *Exhumation of dead body. When ordered.*

The exhumation of the body of the deceased, which is under the plaintiff's control, should be ordered in such case, if at all, only on a strong showing that, without its examination, a fraud is likely to be accomplished, which the company has exhausted every other legal means of exposing. *Ib.*

3. *Evidence. Patient's statements to physician.*

A patient's statements to his physician, as to what he has heard of a past injury to himself, are incompetent, but are admissible in evidence when they relate to his symptoms at the time they are made. *Ib.*

4. *Same. Hearsay. Admissions after insurance.*

Statements by the applicant of facts told him, if made after the policy is issued for another's benefit, are inadmissible in evidence to contradict the written answers in his application. *Ib.*

5. *Interest. Lex loci solutionis. Lex fori.*

Interest on a life-insurance policy which is payable in Alabama should be calculated at eight per cent, according to the law of that State, although the suit is in a court of this State. *Ib.*

### LIMITATION.

See REQUEST.

## LIMITATION OF ACTIONS.

1. *Account stated. New promise.*

The verbal acknowledgment of an account's correctness, making it an account stated, will not avoid the Statute of Limitations as applicable to open accounts. *Code* 1871, § 2165. *Reinhardt v. Hines*, 51 Miss. 344, and *McCall v. Nave*, 52 Miss. 494, criticised. *Floyd v. Pearce*, 140; *Potts v. Hines*, 735.

2. *Mutual and open current account.*

Cash payments upon an open account will not create a mutual and open current account within *Code* 1871, § 2164, which provides, as to the Statute of Limitations, that the cause of action for the balance due shall be deemed to have accrued at the time of the true date of the last item proved. *Abbey v. Owens*, 810.

3. *Same. Nature of the cross-demand. Personal property.*

A sale or delivery of personal property, by the debtor to the creditor not intended or accepted as a payment upon the account, gives the debtor a right of action for the price, and constitutes the mutual and open current account contemplated by the statute. *Penniman v. Rotch*, 3 Met. 216, cited. *Ib.*

4. *Same. Date of mutual dealings.*

It must be shown that, upon both sides of the account, there are items of indebtedness which accrued within the period of limitation, and if the dealings are on one side only within that period, the statute does not apply. *Gulick v. Princeton Turnpike Co.*, 14 N. J. 545, cited. *Ib.*

5. *Same. Item barred at date of cross-demand.*

The cross-demand will not revive liability for items barred at the date of its origin, but will draw to the last item of the mutual account such items only as were not then barred. *Ib.*

6. *Absence from and residence out of State.*

Under the second clause of *Code* 1871, § 2157, a person, who, after a cause of action has accrued against him, removes and resides out of the State, is entitled, in computing the bar of the Statute of Limitations, to the benefit of the time spent here on subsequent visits, open, notorious and long enough for suit. *Pindell v. Harris*, 739.

7. *Same. Successive absences. Running of statute.*

Such person cannot claim that because of his visit to the State his subsequent absences are to be disregarded, and the statute to run continuously, for the rule announced in *Ingraham v. Bowie*, 33 Miss. 17, is altered by the second clause of *Code* 1871, § 2157. *Wühers v. Bullock*, 53 Miss. 539, cited. *Ib.*

8. *Same. Absence and non-residence both essential.*

The clause refers to those who, residing here when the right of action

accrues, thereafter remove, and are absent from and reside out of the State ; and, if the debtor either retains his residence or is present here, the statute continues to run in his favor. *Ib.*

9. *Same. Transient or clandestine visit.*

The time of the debtor's merely passing through the State, or coming into it for a few hours or days each week or month, or his furtive, clandestine, or transient presence here, cannot be estimated in his favor. *Ib.*

10. *Coverture.*

The Statute of Limitations, by virtue of Code 1871, § 2156, does not run against a married woman, to whom a note is indorsed, after a new promise to her by the maker, notwithstanding her rights and remedies under other sections of the Code. *McLaughlin v. Spengler*, 818.

11. *Same. Note for land.*

A bill in equity to enforce against land a married woman's note for the purchase-money thereof is subject to the limitation applicable to that form of indebtedness, and not to the one of ten years, prescribed by Code 1871, § 2175, in relation to express trusts. *McNair v. Stanton*, 298.

12. *Equity pleading. Demurrer.*

The defence of the Statute of Limitations can be made in equity by demurrer to the bill. *Ib.*

13. *Plea. Practice. Supreme Court.*

The defence of the Statute of Limitations, in bar of an appeal, is not available, unless pleaded, in the Supreme Court. *Hendricks v. Pugh*, 157.

14. *Decedents' estates. Erroneous insolvency decree. Reversal.*

The heir cannot, on reversal of a decree of insolvency simply erroneous as to him, plead, against creditors of the estate, the statutory limitation, which accrued after the decree. *Ib.*

15. *Same. Death of party.*

If a person liable to an action dies before it is barred, the suit may be brought within one year and six months after the date of letters of administration. Code 1871, §§ 1184, 2162, 2170. *Adams v. Williams*, 88.

16. *Same. One year after administration.*

If an intestate dies before his indebtedness was barred by the Statute of Limitations, it will not be barred thereby until one year after administration. *Bissinger v. Lawson*, 86.

17. *Same. Four years' bar.*

A promissory note which matures after the maker's death is not within Code 1871, § 2155, which provides that no suit shall be

brought against an executor or administrator, upon a cause of action against his testator or intestate, more than four years after his qualification. *Sivley v. Summers*, 712.

18. *Same. Notice to creditors.*

The four years' limitation (Code 1871, § 2155), like the general Statute of Limitations, runs without regard to publication for creditors to probate their demands, which has no effect on any statute except that which requires claims to be registered within a prescribed time. *Ib.*

19. *Same. Suits against executor. Nine months' suspension. War.*

Actions on notes maturing before the death of the maker whose executor qualified on Aug. 1, 1864, are barred by the four years' limitation on Aug. 12, 1872, notwithstanding the suspension of the statute until April 2, 1867, and the addition of nine months after the executor's appointment, during which he cannot be sued. *Ib.*

20. *Trust. Beneficiary in remainder.*

The Statute of Limitations does not begin to run against a *cestui que trust* in remainder until the termination of the particular estate. *Groves v. Groves*, 658.

See AMENDMENT; CREDITOR'S BILL, 6; EJECTMENT, 5; ESTATES OF DECEASED PERSONS, 2; JUDGMENT; PLEADING, 4, 5.

### LIMITATION OF PROSECUTIONS.

See PRIVILEGE TAX, 4.

### LOCAL ASSESSMENTS.

See MUNICIPAL CORPORATION, 1-14.

### LUNATIC.

See AMENDMENT, 2.

### MALICE.

See ASSAULT, 2-4; HOMICIDE; LIBEL; MALICIOUS PROSECUTION.

### MALICIOUS PROSECUTION.

1. *Trespass on the case. Corporation.*

A corporation is, like a natural person, liable to an action of trespass on the case for a malicious prosecution conducted by its officers and agents. *Williams v. Planters' Ins. Co.*, 759.

2. *Misjoinder of counts. False imprisonment.*

That some counts in the declaration aver imprisonment in consequence of the prosecution, neither converts the action into trespass nor constitutes misjoinder. *Ib.*

See TRESPASS ON THE CASE.

## MARRIAGE.

*Cohabitation. Const., art. 12, § 22.*

A man and woman whose connection began in the lifetime of a former wife, who died in 1867, if they desired marriage, lived together as husband and wife, and so held themselves out to the world, at the ratification of the Constitution of 1869, were, by art. 12, § 22, thereof, united in matrimony, without any new consent or formal ceremony. *Adams v. Adams*, 267.

See DIVORCE; HUSBAND AND WIFE; MARRIED WOMAN; UNLAWFUL COHABITATION.

## MARRIED WOMAN.

1. *Separate estate under a will. Equitable charges.*

A married woman holds land in this State, which is devised to her "sole and separate use" wherein her husband "shall have no right or interest," under the will alone; and her power to charge it is determined, not by the statute, but by the general principles of equity in relation to such estates. *Frierson v. Williams*, 451.

2. *Same. Absence of trustee. Power to charge. The statute inapplicable.*

The failure of the will to name a trustee of the legal title does not subject her estate to the operation of the married woman's statute, but she holds the land devised free from the control of her husband, and with power to charge it as a *feme sole*, according to the provisions of the will. *Ib.*

3. *Same. Conflict of laws. Lex rei sitæ. Lex loci contractus. Lex domicilii.*

A promissory note made by such wife as surety for her husband, in Louisiana, where she resides, although void by the law of that State, can be enforced against the land in this, if she contracted with reference thereto, and intended to charge it with the debt. *Ib.*

4. *Separate estate under the statute. Mortgage.*

A married woman's mortgage of her land, in which her husband joins, to secure money paid for taxes thereon, and a surgeon's bill for services to herself, binds the *corpus* of the estate conveyed for the protection of those debts. *Harmon v. Magee*, 410.

5. *Same. Borrowed money. Representations as to use.*

Money borrowed by her through her husband is not protected by such



a mortgage, although he represented to the lender that it was to be used for the purchase of family supplies and necessities, if it was not so used. *Ib.*

6. *Same. Husband's debt. Chancery pleading. Foreclosure bill.*

While the mortgage will bind the income of the wife's estate if her husband borrowed and used the money, the bill must allege that it is the husband's debt, and a decree subjecting the income is erroneous if both the pleadings and proof show that it is the wife's. *Ib.*

7. *Same. Plantations and family supplies.*

Plantation and family supplies furnished a wife, on her personal application and that of her husband with her consent, are a charge upon her separate estate, although the merchant accepts the husband's note, and a void mortgage made by him and his wife as security. *Cooper v. Allen*, 694.

8. *Same. Statutory agency.*

A husband's power to contract for himself is not absorbed in his statutory agency for his wife, and her plantation is not liable for supplies which he obtains on his own credit, unless it receives the benefit of the purchase. *Caldwell v. Hart*, 123.

9. *Same. Use of supplies. Agency. Estoppel.*

The mere fact that a husband, in purchasing supplies, states that they are for a plantation, which the seller believes to be his, does not estop his wife, who in fact owns the plantation, to deny that they were used thereon. *Ib.*

10. *Same. Charge. Husband's agency.*

The doctrine by which the wife's plantation is charged for supplies used thereon, reviewed, and the husband's statutory agency discussed in connection therewith. *Ib.*

11. *Same. Family supplies. Wife's consent.*

A married woman's separate estate cannot be charged for family supplies, purchased by her husband on his credit, without her consent. *Ib.*

12. *Chancery practice. Evidence. Decree.*

Under a bill to enforce the statutory charge for plantation supplies, if the proof shows supplies both for the plantation and the family, but negatives liability for the family supplies, no decree can be rendered for the former, without distinguishing them from the latter. *Ib.*

13. *Vendor and vendee. Title bond. Assignment of note.*

The assignee of a married woman's note, for land sold by title bond, can compel her in equity to pay the note or surrender the land. *Hendrick v. Foote*, 117.

14. *Promise to pay antenuptial debt.*

*Quære*, Can a married woman bind herself or property by a promise to pay an antenuptial debt. *Pindell v. Harris*, 739.

15. *Judgment against. Sale thereunder.*

If the record in a suit against a married woman fails to show that she has separate property, or the circumstances which bind it, a sale, under a judgment *nil dicit*, passes no title to her land. *Duncan v. Robertson*, 820.

16. *Purchaser at sale. Bill to prevent cloud.*

Her husband, who purchases at such sale, cannot maintain a bill to enjoin a sale under another judgment against his wife upon the ground that it is void. *Ib.*

17. *Chancery practice. Remitting parties to legal remedies.*

If the validity of the judgment sought to be enjoined is doubtful, the bill should be dismissed without prejudice to the legal rights of the parties. *Ib.*

See ACKNOWLEDGMENT; AMENDMENT, 1; EJECTMENT, 6, 7; HUSBAND AND WIFE; LIMITATION OF ACTIONS, 10, 11; PARTNERSHIP, 7, 8.

## MARSHALLING ASSETS.

See CREDITOR'S BILL, 8; PURCHASER IN GOOD FAITH, 1-4.

## MASTER IN CHANCERY.

See CHANCERY COURT, 2.

## MEMBER OF FAMILY.

See SERVICE OF PROCESS.

## MERCHANT.

See ACCOUNT STATED, 2-4; PRIVILEGE TAX.

## MESNE PROFITS.

See EJECTMENT, 1-3.

## MILL-DAM.

See OBSTRUCTION TO WATERCOURSE.

## MORTGAGE.

See CHANCERY PLEADING, 5, 6; CHATTEL MORTGAGE; GUARANTY, 3; HUSBAND AND WIFE, 5, 6; MARRIED WOMAN, 4-6; PARTIES, 3; TENDER; TRUST AND TRUSTEE, 2, 3.

## MOTION AGAINST SHERIFF.

See SHERIFF.

## MULTIFARIOUSNESS.

See CIRCUIT CLERK, 3.

## MUNICIPAL BONDS.

1. *Variance from statute. Date of payment.*

Under a statute authorizing a municipality to issue bonds in aid of a railroad, payable not later than ten years from the date of issuance, bonds made payable twenty years from their date are void. *Woodruff v. Okolona*, 806.

2. *Same. Purchaser for value. Recitals. Want of power.*

Recital in the bonds of conformity to the statute is not conclusive in favor of a purchaser for value, but he must look to the statute, and is chargeable with notice of any want of power to issue the specific bonds. *Ib.*

## MUNICIPAL CORPORATION.

1. *Police power. Local assessments. Streets.*

While a local assessment requiring each lot-owner on a street to improve the carriage-way in front of his property is unconstitutional, the paving and repairing of the sidewalk may be imposed on him as a police duty. *Macon v. Patty*, 378.

2. *Same. Fire limits. Non-combustible pavement.*

A municipality, whose charter enables it to provide for the prevention of fires and the construction and repair of sidewalks, may, in the exercise of its police power, require sidewalks within its fire limits to be paved with bricks. *Ib.*

3. *Same. Delegation. Discretionary power. Street repairs.*

The board of mayor and aldermen of the municipality, who are authorized to determine when the sidewalks are out of repair, cannot delegate such power to a street committee.

4. *Same. Local assessments. Sidewalks. Materials.*

Police power explained and defined, and distinguished from local assessments for improving streets; and the effect of location, use, and like circumstances discussed in determining what materials may be required in sidewalks. *Ib.*

5. *Local assessments. Source. History and principles.*

Local assessments explained and their judicial history given, with the grounds on which they rest and the principles by which they are regulated, with especial reference to streets in towns and cities. *Ib.*

6. *Same. Land. Public use.*

A local assessment which applies to land alone, and is incident to its location, is the regulation of the management of an interest common to the persons of a district and the general public, so that those who enjoy the benefits shall equally bear the burden. *Ib.*

7. *Same. Eminent domain. General taxes.*

The power to make local assessments is distinct from the right of eminent domain, and, though a taxing power, it is special and peculiar, and is not regulated by the constitutional provisions as to equality and uniformity on an *ad valorem* basis. *Ib.*

8. *Same. Limitations on the power. Apportionment.*

The power is, however, not arbitrary; but among the limitations, arising from its nature and that of the taxing power, which the courts will enforce, is the one that the assessment cannot be imposed upon an individual, but must be apportioned among a sub-district of several. *Ib.*

9. *Same. Constitutional law. The conservative principle.*

The constitutional prohibition against taking for public use without compensation, restrains not only the right of eminent domain, but all invasions of private property by public authority, including the exaction of money under the guise of taxation, beyond the limits of the taxing power. *Ib.*

10. *Same. Object. Improvement. Rate.*

The object of the assessment must be public, but not so exclusively public as to prevent its imposition in a particular locality; its proceeds must be expended on an improvement plainly exceptive and beneficial to the property on which it is imposed, and its rate must not be excessive, beyond the cost of the improvement. *Ib.*

11. *Same. Sub-district. Enforcement.*

It is levied, under authority derived from the legislature, on property in a district created for the purpose, and enforced by the summary remedies for collecting taxes, but is exceptional in time and locality, and ceases with the accomplishment of its object. *Ib.*

12. *Same. Public benefit. Consent of property-owners.*

When the district is less than a legal subdivision of the State, an assessment for an improvement, in the use of which the general public are interested, is invalid without the consent, in some way expressed, of the people of the district. *Per GEORGE, C. J. Ib.*

13. *Same. Streets. Municipal ordinance.*

An ordinance is valid if it requires all the streets in the town to be paved, and assesses the property-holders of each street with the costs of their street; or if much of the town has been improved by local assessments on the several streets, and it provides similarly for paving the remainder. *Ib.*

14. *Same. Improving streets. Consent of property-owners.*

If, however, the municipality selects a part of the streets to be improved in that way, or selects a part to be improved in a manner exceptionally expensive as compared with the remainder, the persons on whom the burden is cast have a right to be consulted. Per GEORGE, C. J. *Ib.*

15. *Warrants. Fraudulent alteration. Negligence.*

A municipal corporation is not liable for the increased face value of warrants drawn upon its treasury, which the clerk of its council has fraudulently raised after issuance, although the failure of its officers to draw lines through the spaces enabled the alteration to be made so skilfully as to prevent detection by purchasers in good faith. *Chandler v. Bay St. Louis*, 326.

16. *Same. Nature and assignability. Void if unauthorized.*

City warrants, which are mere certificates of amounts due parties to whom they are issued and a means of adjusting and paying the same, though transferable under our statute, possess none of the elements of commercial paper, and impose no liability on the municipality further than they are authorized by law. *Ib.*

17. *Same. Non-liability for its officers' crimes and torts.*

While municipal officers may render themselves personally liable by crimes or torts committed *colore officii*, they impose no liability on the corporation unless expressly authorized or subsequently ratified, or done in pursuance of a general authority over the subject-matter. *Ib.*

18. *Nuisance. Charter. Ordinance.*

Although the charter of a city empowers the mayor and selectmen, by ordinance, to prevent nuisances and dangerous manufactories, and regulate the latter, they cannot, on a petition of citizens, deal thus with a flouring mill, unless it is shown by the record to fall within some law or general ordinance previously passed. *Lake v. Aberdeen*, 280.

19. *Same. Mayor's Court. Appeal. Jurisdiction of Circuit Court.*

If such charter gives the right of appeal to every party to a cause or prosecution, from the final judgment or sentence of the mayor to the Circuit Court of the county, the latter should not dismiss the appeal from the mayor's judgment condemning such mill as a nuisance. *Ib.*

See MUNICIPAL BONDS.

## MURDER.

See ASSAULT, 8, 4; CRIMINAL LAW AND PROCEDURE, 1-5; EVIDENCE, 4.

## MUTUAL ACCOUNTS.

See ACCOUNT STATED; LIMITATION OF ACTIONS, 1-5.

## NAME.

See SERVICE OF PROCESS.

## NECESSARIES.

See INFANT, 1-5.

## NEGLECT.

See COMMON CARRIERS; EXECUTOR AND ADMINISTRATOR, 2, 3, 7; INFANT, 7; MUNICIPAL CORPORATION, 15.

## NEGOTIABLE PAPER.

See BILL OF EXCHANGE; GARNISHMENT; GUARANTY; PROMISSORY NOTE; MUNICIPAL CORPORATION, 15-17.

## NEW PROMISE.

See LIMITATION OF ACTIONS, 1.

## NEW TRIAL.

1. *Immaterial errors.*

A new trial will not be granted for errors on the trial in the Circuit Court where, on a record introduced in evidence by the plaintiff in error, the verdict is manifestly right. *Bell v. Medford*, 31.

2. *Exclusion of evidence. Immaterial errors.*

Where material and competent evidence has been excluded, the judgment will be reversed, unless the verdict would be clearly right, if the evidence had been admitted. *Anding v. Levy*, 51.

3. *Same. Single issue.*

If the excluded evidence was pertinent to the only issue raised, this court, to affirm, must be satisfied that the evidence, if admitted, would have been insufficient to authorize a different verdict. *Ib.*

4. *Same. Two issues. Case in judgment.*

If the evidence was pertinent to one of two issues, to justify the verdict on the second, which involved the trial of a fact, which is a conclusive answer to the claim set up under the first, it must appear that the second issue was tried, and that a contrary verdict thereon would be vacated. *Ib.*

5. *Same. New points in Supreme Court.*  
But in the last case it is sufficient, if, as in *Bell v. Medford*, 31, evidence, in its nature incontrovertible, as, for instance, a record, was introduced, which in law would have compelled the rendition of the verdict. *Ib.*
6. *Third new trial. Order granting. Writ of error.*  
The general rule that a writ of error will not lie to an order granting a new trial does not apply to such order if made after three concurring verdicts, which is prohibited by Code 1871, § 647. *Tagert v. Baker*, 303.
7. *Same. Errors of fact alone covered by the statute.*  
If, without error of law in either of the three trials, the new trials are granted because of the jury's incorrect conclusions of fact, the order vacating the third verdict is void, and the successful party is entitled to judgment. *Ib.*
8. *Same. Practice in Supreme Court. Judgment.*  
The Supreme Court, if satisfied that the last new trial is unauthorized, will vacate the order and remand the case with instructions to enter judgment *nunc pro tunc* on the last verdict, but, if not so satisfied, will affirm the order and remand, with instructions to proceed to another trial. *Ib.*
9. *Same. Presumption as to correctness of order granting.*  
On the party asserting that the lower court has disregarded the statute the burden rests to show affirmatively that all the verdicts have been set aside because erroneous on the facts. *Ib.*
10. *Order granting new trial. Recitals.*  
*Semble*, that orders granting new trials should recite whether they are made for errors of law or incorrect findings of fact. *Ib.*  
  
See JUROR, 6-9; RAPE, 2; SUPREME COURT, 1; VERDICT.

#### NON-RESIDENT.

See LIMITATION OF ACTIONS, 6-9.

#### NONSUIT.

See INSTRUCTIONS, 3.

#### NOTICE.

See AGRICULTURAL LIEN, 9, 10; BOND, 1, 4; CIRCUIT CLERK; COVENANT, 1; ESTATES OF DECEASED PERSONS, 2-7; FRAUDULENT CONVEYANCE, 7-9, 12; JUDGMENT LIEN, 3; LIMITATION OF ACTIONS, 18; PURCHASER IN GOOD FAITH, 5, 6; SET-OFF, 3; TRUST AND TRUSTEE, 2, 3.

## NUNCUPATIVE WILL.

See WILL, 6, 7.

## OBSTRUCTION TO WATERCOURSE.

1. *Proceeding to remove. When applicable. Mills and machinery.*  
The thirty-fourth chapter of the Code of 1871 refers to obstructions to watercourses, erected by persons who have mills, gins and other machinery; and the summary remedy authorized by § 1935 is not applicable to levees and ditches on farms and residences. *Trice v. Lagrone*, 839.
2. *Same. Embankment not for machinery. Judgment of removal. Injunction.*  
A person injured by a levee and ditch of the latter description must seek redress in the ordinary courts; and, if he obtains the judgment of the special tribunal organized under Code 1871, § 1935, to remove the obstruction, a court of chancery will enjoin its execution. *Ib.*
3. *Same. No appeal from justice of the peace.*  
No appeal lies to the Circuit Court from a justice of the peace, proceeding under Code 1871, § 1935, to remove a levee, which causes overflow and injury to crops. *Lagrone v. Trice*, 227.
4. *Same. Costs of proceeding. Appeal from judgment for.*  
But the justice cannot give judgment for costs in such a case against the defendant, and, if he does, an appeal lies, under Code 1871, § 1382, to the Circuit Court. *Ib.*
5. *Same. Appellate jurisdiction. Circuit Court.*  
The fact that the appellants in such case seek to try anew the question of the levee does not deprive them of the right to have judgment in their favor for the costs. *Ib.*

## OFFICE.

1. *Elegibility. Defalcation.*  
The State Constitution, art. 4, § 16, which disqualifies for office persons liable for public money unaccounted for, applies to private citizens as well as to public officers. *Hoskins v. Brantley*, 814.
2. *Sheriff. New election.*  
If, at an election for sheriff, the candidate who receives the greatest number of votes is ineligible, the incumbent should hold until the board of supervisors orders an election and his successor is qualified. *Ib.*

See CONTESTED ELECTIONS; TAX COLLECTOR UNDER CODE 1871.



OFFICER.

See AGRICULTURAL LIEN, 5, 7, 11; OFFICE; REWARD; SHERIFF.

OPEN ACCOUNTS.

See ACCOUNT STATED; LIMITATION OF ACTIONS, 1-5.

ORDINANCE.

See MUNICIPAL CORPORATION, 13, 18.

OVERRULING DECISIONS.

See VESTED RIGHTS.

PARTIES.

1. *Chancery. Trustee who has conveyed title.*

A trustee, who has sold, is not a necessary party to a bill against the purchaser to whom he has conveyed, filed by the first vendor to subject the land to a lien for an unpaid balance of the original purchase money, which was secured by the deed of trust. *Osborne v. Crump*, 622.

2. *Same. Purchaser pendente lite.*

A purchaser of land, during the pendency of a chancery suit involving the title thereto, is bound by the decree, though not made a party. *Ib.*

3. *Same. Mortgagor who has parted with the property.*

A mortgagor, who has parted with the mortgaged property, is not a necessary party to a bill to foreclose, if no personal decree is sought against him. *Ib.*

See AMENDMENT, 2; BILL OF EXCHANGE, 3; CREDITOR'S BILL, 4; DEED, 9; ESTATES OF DECEASED PERSONS, 2.

PARTITION.

1. *Chancery jurisdiction. Unequal shares.*

The jurisdiction of the Chancery Court to make partition in cases of co-tenancy results from its original powers, and not from the statute; and partition can be made although the shares are unequal. *Pad-dock v. Shields*, 340.

2. *Statutory mode. When applicable.*

The provisions of the Code of 1871 are applicable only where the shares are equal, and no circumstance exists which requires a different method in order to secure the equitable right of one interested in the property. *Ib.*

3. *Sale for division of proceeds. When ordered.*

The power to order a sale for partition is neither of common law nor equitable origin, but is purely statutory, and can be exercised only in the cases provided by statute. Code 1871, § 1829; Acts 1875, p. 119. *Ib.*

4. *Rights of co-tenants. Others' shares.*

A co-tenant has an absolute right to have his share set off, but no power to force the other joint owners to separate theirs, if they prefer to hold in common. *Ib.*

5. *Unequal shares. Mode of division.*

If several claim, from a common source, interests equal among themselves, but unequal as compared with other co-tenants, their interests may be set off together, and then divided among them by ballot. *Ib.*

6. *Allotment by ballot. When departed from.*

The statutory method of partition by ballot is to be pursued in all cases where it is applicable, but is not exclusive, and may be departed from whenever necessary. *Ib.*

7. *Infants. Election.*

The share of a deceased co-tenant may be set off *in solido* to his widow and his heirs, when the latter are minors, and incompetent to elect to divide their interests. *Ib.*

8. *Improvements by a co-tenant.*

A co-tenant, who has improved part of the common property is entitled to the improved part, or, if that will injure the other co-tenants, to have compensation in money. *Ib.*

9. *Vendee of interest in a co-tenant's share.*

If practicable and consistent with the rights of the other joint-owners, partition will be so made as to protect a co-tenant's alienee of an interest only in a particular part of the common property. *Ib.*

10. *English statutes. None in force here.*

None of the English statutes are in force in this State. *Sessions v. Reynolds*, 7 S. & M. 130; *Boarman v. Callett*, 13 S. & M. 149, and *Jordan v. Roach*, 32 Miss. 616, cited. *Ib.*

See CHANCERY, 1; CHANCERY PRACTICE, 3, 4; INFANT, 6.

## PARTNERSHIP.

1. *Lawyers. Liability for copartner's acts.*

Want of authority in a firm of lawyers to sell claims held for collection is no defence to a suit against one partner, to recover money paid the other by a purchaser for claims which he has not received. *Pierce v. Jarnagin*, 107.

2. *Same. Contract. Rescission. Plaintiff in default.*  
But such purchaser cannot sue if he has paid only part of the agreed price, for he has not complied with the contract. *Ib.*
  3. *Same. Ground for rescinding. Consistent act.*  
The fact that the owner has reduced the claims to judgments for their full value constitutes no ground for a rescission of such contract. *Ib.*
  4. *Dissolution by death. Lawyers' fees.*  
Unless the surviving partner of a firm of lawyers makes a new contract, he cannot claim additional compensation from a client for conducting to a conclusion the defence of a chancery suit, which the firm began before the death of the other partner, and for which it was paid the entire fee agreed upon. *Dowd v. Troup*, 204.
  5. *Same. Payment of creditors.*  
The surviving partner is not bound to distribute the partnership assets ratably among the firm creditors, but may pay one in full to the exclusion of the others. *Roach v. Brannon*, 490.
  6. *Creditor's bill. Chancery jurisdiction.*  
A general creditor of a firm, who has no lien, cannot maintain a bill in chancery against the surviving partner to subject the partnership assets. *Freeman v. Stewart*, 41 Miss. 188; *Schmidlapp v. Currie*, 55 Miss. 597, cited. *Ib.*
  7. *Married woman. Holding herself out as partner.*  
*Quære*, Is a married woman, who holds herself out as a member of a commercial firm, liable for firm debts, when not an actual partner. *Rittenhouse v. Leigh*, 697.
  8. *Same. Use of her name against her consent.*  
If, on hearing that the firm is using her name, she forbids it, and never hears that her prohibition is violated, she is not estopped thereby to deny that she is a partner. *Ib.*
- See ATTACHMENT, 3, 4, 8-10, 13-16; FRAUDULENT CONVEYANCE, 2-6; GUARANTY, 1.

## PARTY WALL.

1. *Adjoining houses. Effect of their destruction.*  
While the houses stand on either side of a party wall, neither proprietor can do any act to impair the other's property, and either is at liberty to keep the wall in order; but if the houses are accidentally destroyed each is owner in severalty of his own soil, and may dispose as he pleases of so much of the wall as stands thereon. *Hoffman v. Kuhn*, 748.
2. *Same. Rebuilding. Injunction. False issue. Estoppel. Costs.*  
If one of the proprietors attempts to rebuild to the wall, the other can enjoin him; and while the latter is not estopped to rely upon the

destruction without his fault of the houses, by having tendered the false issue that the wall is unsafe, he is liable for the additional costs occasioned thereby. *Ib.*

### PAUPER, SUIT BY.

See **APPEAL**, 2.

### PAYMENT.

*Sum less than debt.*

Payment of a less is not a good plea to a demand for a greater sum. *Burrus v. Gordon*, 93.

See **ACCORD AND SATISFACTION**; **ACCOUNT STATED**, 1; **DEED OF TRUST**, 4; **GARNISHMENT**; **GUARANTY**, 3; **PROBATE COURT AND PROCEEDINGS**, 2; **RECEIPT**; **SET-OFF**, 2.

### PERJURY.

#### 1. *Witness. Juror. Competency. Opinion.*

In a prosecution for perjury, committed by swearing to an *alibi* in an arson case, a juror who has formed an opinion as to the guilt or innocence of the person tried for arson is incompetent, although he has formed or expressed none as to the person charged with perjury. *Brown v. State*, 424.

#### 2. *Evidence. Relevancy.*

If the charge is falsely swearing that the person tried for arson was at the witness's house from half-past seven on the night before the fire until four o'clock in the morning when it occurred, it is material to prove that he was in a store near the scene of the fire until midnight. *Ib.*

#### 3. *Same. Competency. Hearsay.*

Declarations of the person accused of arson, made before his trial, and tending to show his guilt, and therefore contradictory of the *alibi*, are incompetent as evidence in the prosecution for perjury, unless the defendant in that case was present when they were made. *Ib.*

#### 4. *Indictment. Knowledge of falsity of oath.*

The averment in an indictment for perjury that the accused knew that the statement was false is necessary only when the oath was as to the witness's belief; and, if it was absolute, the averment is surplusage, and the indictment should be construed as if it was omitted. *Ib.*

#### 5. *Wilfully and corruptly false. Mistake and inadvertence.*

It must be shown that the oath was wilfully false, and if its falsity resulted from mistake or inadvertence, there is no perjury; but it is unnecessary for an instruction requiring it to be wilfully false to state that it must be corruptly so, since the former implies the latter. *Ib.*

6. *Same. Rule as to two witnesses. Instructions.*

The jury should be informed, in some part of the instructions in a trial for perjury, that, before they can convict, the fact that the oath was false must be shown to their satisfaction by the testimony of two witnesses, or by one witness and corroborating circumstances. *Ib.*

7. *Indictment. Averment. Certainty.*

An indictment for perjury is sufficient, under Code 1871, § 2667, although it fails to set out, with the highest degree of certainty, the county in which the indictment was found on the trial whereof the false testimony was given, or the plea which was filed in that case. *Ib.*

PERPETUITY.

See REQUEST.

PILOT.

See QUARANTINE.

PLANTATION SUPPLIES.

See AMENDMENT, 1; INFANT, 3; MARRIED WOMAN, 5, 7-12.

PLEA.

See ATTACHMENT, 17; CHANCERY PLEADING, 5, 6; COVENANT, 3; LIMITATION OF ACTIONS, 13; PLEADING, 3-5, 7.

PLEADING.

1. *Argumentativeness. Acts 1878, p. 190.*

Under our system, argumentativeness in a pleading is no ground of demurrer. *Sims v. Eiland*, 83.

2. *Declaration. Debt on bond. Breach of condition. Wrongful attachment.*

A declaration in debt on a bond conditioned to pay such damages as the defendant in attachment shall sustain by its wrongful issuance must aver that the attachment was wrongfully sued out. *Azlin v. Lake*, 693.

3. *Demurrer. Assignment of causes.*

A plea which answers the cause of action, except one dollar, should be sustained against a demurrer thereto which does not assign for cause that it professes to answer the whole action while it covers only a part. *Cox v. Weed Sewing Machine Co.*, 350.

4. *Same. Plea. Statute of Limitations. Fraudulent concealment.*

A plea of the Statute of Limitations is demurrable, if the declaration

alleges that the defendant concealed the cause of action until the statute applied. Code 1871, § 2158. *Shoults v. Kemp*, 218.

5. *Same. Matter of replication.*

While fraudulent concealment is properly matter for replication to such plea, it may, nevertheless, be averred in the declaration, especially if on its face the action is otherwise barred. *Ib.*

6. *Demurrer. Waiver of defect in declaration.*

The omission to state in such declaration that the concealment was fraudulent is waived, unless objected to by demurrer. Code 1871, § 611. *Ib.*

7. *Extending demurrer back to first error.*

A demurrer to a plea cannot be extended back, under our system, so as to reach such defect in the declaration. *Ib.*

8. *Departure. Continuing trespass.*

A replication averring a continuing trespass by abducting a child and preventing it from returning during ten years, is a departure from a declaration which alleges only an abduction ten years ago. *Ib.*

See ADMINISTRATION BOND, 2; ATTACHMENT, 17; CHANCERY PLEADING; CLAIMANT'S ISSUE; COVENANT, 3; GARNISHMENT; LIMITATION OF ACTIONS, 12, 13; MALICIOUS PROSECUTION, 2; PAYMENT; PRACTICE; SET-OFF; VARIANCE; WILL, 5.

## POLICE POWER.

See MUNICIPAL CORPORATION, 1-4.

## PRACTICE.

1. *Plea of non est factum. Affidavit by attorney.*

Under Code 1871, § 687, an attorney can make affidavit for his principal to the latter's plea of *non est factum*. *Northrop v. Flaig*, 754.

2. *Judgment. Demurrer to replication.*

Judgment final for the defendant is improper upon sustaining a demurrer to a replication, upon the ground that it concludes with a verification instead of to the country. *Ib.*

3. *Special demurrer. Conclusion of plea.*

Such a defect is ground only of special demurrer, which is abolished by the act of March 5, 1878 (Acts 1878, p. 190). *Ib.*

4. *Bill for discovery at law. Certainty. Laches.*

A bill for discovery, which is vague and uncertain and does not satisfactorily explain delay in making the defence, may, if filed without leave of court, be stricken out on motion. *Ib.*

5. *Judgment nil dicū. Amended declaration. Pleas.*

If pleas to a declaration are applicable to the amended declaration, which makes no substantial change or new allegation, it is erroneous to render judgment *nil dicū*, although they are not filed afresh. *1b.*

See AGRICULTURAL LIEN; APPEAL; ASSIGNEE IN BANKRUPTCY; ASSIGNMENT, 2; ATTACHMENT; BILL OF EXCEPTIONS; BAIL; BOARD OF SUPERVISORS; CERTIORARI; CHANCERY PRACTICE; CIRCUIT COURT; CLAIMANT'S ISSUE; CONTESTED ELECTIONS; CRIMINAL LAW AND PROCEDURE, 8-13; EJECTMENT, 1-4; EVIDENCE, 5; HABEAS CORPUS; INDICTMENT, 2 4; INSTRUCTIONS; JUDICIAL DISCRETION; JUDGMENT; JURISDICTION; JUSTICE OF THE PEACE; LIMITATION OF ACTIONS, 13; NEW TRIAL; PLEADING; RAPE, 2; SERVICE OF PROCESS; SET-OFF; SHERIFF; SUPREME COURT; VERDICT; VESTED RIGHTS; UNLAWFUL ENTRY AND DETAINER.

PREFERENCE.

See ATTACHMENT, 10; FRAUDULENT CONVEYANCE, 7-12.

PRESCRIPTION.

See FERRY, 1.

PRESUMPTION.

See CRIMINAL LAW AND PROCEDURE, 10; LARCENY; NEW TRIAL, 9; RECEIPT; TRUST AND TRUSTEE, 4, 5.

PRINCIPAL AND AGENT.

See BANKRUPTCY, 2; BILL OF EXCHANGE, 1; CHANCERY PRACTICE, 2; COMMON CARRIERS; DEED OF TRUST, 3, 4; MALICIOUS PROSECUTION, 1; MARRIED WOMAN, 8-10; MUNICIPAL CORPORATION, 3, 15-17; PURCHASER IN GOOD FAITH, 5, 6; TAX COLLECTOR UNDER CODE 1871, 5.

PRINCIPAL AND SURETY.

See ADMINISTRATION BOND; BILL OF EXCHANGE, 5; BOND; CHANCERY CLERK; FRAUDULENT CONVEYANCE, 3; GUARANTY; MARRIED WOMAN, 3; TAX COLLECTOR UNDER CODE 1871.

PRIVILEGED COMMUNICATIONS.

See LIBEL.

## PRIVILEGE TAX.

1. *Unlicensed trader. Illegal sale.*  
Under the fifth section of the privilege-tax law (Acts 1875, p. 10), contracts of sale made by a merchant in his business, during the time he is unlicensed, are void. *Anding v. Levy*, 51; *Decell v. Lewenthal*, 331.
2. *Same. Repeal of the statute.*  
The statute was self-executing, and its subsequent repeal did not make such contracts valid. *Ib. Ib.*
3. *Same. Re-enactment in repealing statute.*  
Being re-enacted *ipsisimis verbis* in the act of March 5, 1878 (Acts 1878, p. 12), which repealed the former statute, it was not repealed, but continued law. *Anding v. Levy*, 51.
4. *Same. Limitation of prosecutions. Misdemeanor.*  
A criminal prosecution against such merchant, for exercising the privilege of conducting his business prior to January, 1877, without first paying the tax and procuring the license, is *prima facie* barred in April, 1879, by the Statute of Limitations. *Decell v. Lewenthal*, 331.

See STATUTE, 2.

## PRIVITY.

See EJECTMENT, 6; UNLAWFUL ENTRY AND DETAINER, 4.

## PROBATE COURT AND PROCEEDINGS.

1. *Jurisdiction. Minor residing out of county.*  
Under Const. of 1832, art 4, § 18; Code 1857, p. 459, art. 142, no Probate Court could appoint a guardian for a minor who resided in a county of this State other than that in which the court was held. *Duke v. State*, 229.
2. *Guardian. Void appointment. Payment.*  
If an administrator was so appointed guardian of a distributee of the estate, payment of the distributive share by crediting his account with the estate and debiting that with the ward was a nullity. *Earle v. Crum*, 42 Miss. 165, cited. *Ib.*
3. *Evidence. Competency. Decree void on its face.*  
The record of such guardian's appointment, offered in support of a plea of payment in a suit on the administration bond, should be excluded from evidence by the court, if it shows on its face, by a recital in the bond, that the minor at its date resided out of the county. *Ib.*

See CHANCERY, 2, 3; CHANCERY COURT, 2; CREDITOR'S BILL, 1-5; ESTATES OF DECEASED PERSONS; EXECUTOR AND ADMINISTRATOR; PURCHASER IN GOOD FAITH, 1-4; WILL.



PROCESS.

See ESTATES OF DECEASED PERSONS, 3-7; SERVICE OF PROCESS;  
SHERIFF.

PRO CONFESSO.

See CHANCERY PRACTICE, 6, 7.

PROHIBITION.

See CONTESTED ELECTIONS, 3, 7, 8; JURISDICTION, 3.

PROMISSORY NOTE.

1. *Maturity. Days of grace.*

A promissory note is not due for three days after the date of payment expressed on its face. *Chambliss v. Matthews*, 306.

2. *Considerations. Illegality of one of several.*

A promissory note given for goods and spirituous liquors sold by a licensed vendor in less quantities than one gallon, being, under Code 1871, § 2464, for an illegal consideration as to the liquor, is void in whole. *CHALMERS, J.*, doubted. *Cotten v. McKenzie*, 418.

3. *Same. Action for the legal debts. Not affected by illegal note.*

The invalidity of the note does not, however, affect the payee's right to recover the price of the goods, in an action properly instituted for that purpose, and under appropriate pleadings. *Ib.*

4. *Same. Illegality. Insufficiency.*

A distinction exists between want or insufficiency of consideration and illegality. An entire contract based on several considerations will be upheld if one is sufficient, although the others are insufficient, but if one of them is illegal, the whole contract is void. *Ib.*

See ASSIGNMENT, 2; BILL OF EXCHANGE; CHANCERY PLEADING, 5, 6;  
CONSIDERATION, 3; GARNISHMENT; GUARANTY; LIMITATION OF  
ACTIONS, 11, 17, 19; MARRIED WOMAN, 3, 13; SET-OFF, 3, 4.

PUBLICATION.

See CHANCERY PRACTICE, 1; ESTATES OF DECEASED PERSONS, 4; LIMITATION OF ACTIONS, 18.

PUBLIC MONEY.

See COUNTY; OFFICE, 1.

## PUBLIC OFFICER.

See CONTESTED ELECTIONS; OFFICE; SHERIFF; TAX COLLECTOR UNDER CODE 1871; TAX SALE.

## PURCHASER IN GOOD FAITH.

1. *Bill to vacate sale. Restoration of status quo.*  
The sole creditor of an insolvent estate, who has purchased land by collusion with the administrator, and paid for it with his claim, if the sale is cancelled at suit of the heir, should be restored to his status as a creditor. *Sivley v. Summers*, 712.
  2. *Same. Improvements and rents. Trustee. Administrator.*  
Improvements which the executor and his confederate, who hold under the fraudulent sale, have put on the land should not be allowed them, but they should not be charged increased rent caused by the improvements. *Tatum v. McClellan*, 56 Miss. 352, cited. *Ib.*
  3. *Same. Taxes. Lien. Assessment. Land listed to dead person.*  
They should be allowed for taxes assessed upon the land, which was listed in the name of a dead person who had owned a life-estate therein, if they alone paid them; *aliter*, if the heir paid the same taxes. *Ib.*
  4. *Same. Assessment roll. Approval.*  
The result is not altered by the fact that the assessment of taxes was irregular, because the assessment roll of land was not approved by the board of supervisors in session at the county town. *Ib.*
  5. *County railroad bonds. Innocent purchaser. President of road.*  
The president of a railroad company is not an innocent purchaser of bonds issued in aid of the railroad by the board of supervisors of a county in violation of the Constitution and the statute which authorize their issuance only upon condition that two thirds of the legal voters of the county shall vote in favor thereof, if he receives them as bound to do under the charter, although he passes them to a creditor with notice, and takes them back as an individual purchaser. *Supervisors v. Paxton*, 701.
  6. *Same. Estoppel to deny validity. Receipt of stock. Paying interest.*  
The county is not estopped to maintain a bill to enjoin him from disposing of the bonds and cancel them, by the acts of the board of supervisors in assuming control of the railroad stock received therefor, and levying taxes and paying the interest on the bonds. *Ib.*
- See AGRICULTURAL LIEN, 9, 19; BILL OF EXCHANGE, 3, 5; DEED, 7-10; FRAUDULENT CONVEYANCE, 7-12; HUSBAND AND WIFE, 3; MUNICIPAL BONDS, 2; MUNICIPAL CORPORATION, 15, 16; PARTIES, 2.

## QUARANTINE.

1. *Pilot. Incoming vessel. Duty to display flag.*

An indictment against a person for violating the sixth section of the quarantine law (Acts 1877, p. 64) by bringing a vessel into a port on the Gulf coast of this State, without displaying a flag at half-mast, must aver that he was a pilot at one of such ports, as the statute refers to local licensed pilots. *Bloom v. State*, 752.

2. *Same. What vessels subject to the requirement. Infected ports.*

The duty of pilots to so display the flag for the quarantine physician is not confined to vessels from infected ports, but embraces all incoming vessels, and an indictment for neglect thereof need not allege that the vessel has visited or departed from any infected port. *Ib.*

See CHANCERY PRACTICE, 4; CIRCUIT CLERK, 3.

## RAILROAD AID BONDS.

See MUNICIPAL BONDS; PURCHASER IN GOOD FAITH, 5, 6.

## RAPE.

1. *Indictment. Feloniously.*

Under Code 1871, § 2672, as at common law, an indictment for rape must charge that it was "feloniously" done, and the averment that the accused feloniously did make an assault, and her then and there forcibly and against her will ravish and carnally know, is insufficient. *Hays v. State*, 783.

2. *Same. New trial. Practice on reversal.*

If the accused is convicted of rape on such an indictment, the Supreme Court will sustain a motion for a new trial and remand the case, in order that a trial for assault may be had upon the indictment as it stands, or a new indictment found for rape. *Ib.*

## RECEIPT.

*Effect in evidence. Prima facie import.*

The *prima facie* import of a receipt "in full" or "on account," is that expressed by its language, subject to the right of either party to show that it is erroneous; and there is no *prima facie* presumption that a receipt for so much money "for timber purchased" is in full satisfaction of the price. *Bercier v. McInnis*, 279.

## RECORD.

See EMINENT DOMAIN, 3, 4; REVIEW, BILL OF.

## REMITTITUR.

See ASSIGNEE IN BANKRUPTCY, 2.

## RENT.

See AGRICULTURAL LIEN, 8-10; LANDLORD AND TENANT; PURCHASER IN GOOD FAITH, 2.

## REPLEVIN.

See AGRICULTURAL LIEN, 13; VENUE.

## RES ADJUDICATA.

See AGRICULTURAL LIEN, 13; BAIL, 1; CHANCERY, 6; COUNTY, 2; EJECTMENT, 3; VESTED RIGHTS.

## RESULTING TRUST.

See HUSBAND AND WIFE, 2, 3; TRUST AND TRUSTEE.

## RETAILING INTOXICATING LIQUORS.

See DRUGGIST; PROMISSORY NOTE, 2-4.

## RETURN OF PROCESS.

See SERVICE OF PROCESS; SHERIFF.

## REVIEW, BILL OF.

1. *Error apparent. Newly discovered evidence.*

A bill of review is not maintainable unless it points out errors on the face of the decree or is predicated on newly discovered evidence. *Mayo v. Clancy*, 674.

2. *Same. Decedent's estate. Final settlement. Extraneous facts.*

In determining whether there is error apparent in an administratrix's final settlement, the court cannot look beyond the decree and account, or, on demurrer, consider facts *aliunde* alleged in the bill of review. *Ib.*

3. *Same. Land of decedent. Leasehold. Administratrix's rights.*

If it appears from the account and decree that the administratrix put repairs on the decedent's land, and distributed the rents equally between the widow and heir, that is not error apparent, for the interest in the land may have been a chattel. *Ib.*

4. *Same. Defects reached by bill of review. Errors of record.*  
Under our system, on a bill of review for error apparent on the face of the decree, the court may examine all the pleadings and proceedings of record, but not the evidence. *Enochs v. Harrelson*, 465.
5. *Defence. Demurrer. Plea.*  
The proper defence to such a bill is a demurrer, which, if the decree sought to be reviewed is not fairly stated in the bill, may be accompanied by a plea thereof. *Ib.*
6. *Same. Matter of defence outside the record. How availed of.*  
Ordinarily the only defence to such a bill is in *nullo erratum est*, but if there is any matter beyond the decree available as a defence, it should be pleaded. *Ib.*
7. *Same. Cross bill. Independent equity.*  
A cross bill, setting up an alleged equity, independent of that claimed in the original bill, is inadmissible as a mode of defence to a bill of review. *Ib.*
8. *Practice when decree vacated. New decree.*  
If the bill is sustained and the enrolment opened on the review, that decree should be rendered which is proper on the whole cause, considered as if heard for the first time. *Ib.*
9. *Same. Rehearing. When allowed.*  
If the error goes to the complainant's right to maintain his bill, it is proper to reform the decree at once ; but if that is not the case, and a party seeks a rehearing, it should be allowed, if sufficient reason is shown therefor. *Ib.*
10. *Error apparent.*  
If land is subjected by the decree to a vendor's lien, which the bill shows did not exist thereon, that is error apparent, for which a bill of review is maintainable. *Ib.*
11. *Same. Cross bill. Estate of decedent. Chancery jurisdiction.*  
The land cannot be charged in such case, by a cross bill to the bill of review, with the note for the purchase-money, on the allegation that it is the only debt of the vendee, who died insolvent. *Hargrove v. Baskin*, 50 Miss. 194. *Ib.*
12. *Answer. Confession of error. Defect.*  
An answer to such bill of review, admitting the error which it assigns, entitles the complainant therein to a vacation of the decree. *Ib.*
13. *Practice. New decree. Rehearing.*  
If, then, there is no application for a rehearing, or to vary the original case, the court may render the decree which should have been rendered on the first hearing. *Ib.*

See CHANCERY, 3; CHANCERY PLEADING, 1-4; DECREE, 3.

## REVIVOR.

See CREDITOR'S BILL, 4; JUDGMENT, 1.

## REWARD.

*Capture. Fugitive homicide. Official duty.*

A constable who apprehends a homicide within his county, fleeing before arrest, and delivers him up for trial, simply performs his duty (Code 1871, § 280), and is not entitled to the reward provided in Code 1871, § 2786, for persons not under official obligation to take prisoners. *Ex parte Gore*, 251.

## SALE.

1. *Rescission by seller. Fraudulent misrepresentations.*  
Misrepresentations by the buyer of goods as to his solvency, unless known by him to be untrue, and acted on by the seller under the belief of their truth engendered thereby, will not enable the latter to rescind a completed sale. *Klein v. Rector*, 538.
2. *Same. Reclamation. Time and means.*  
If the buyer never had reasonable expectation of paying for the goods, the seller may reclaim them at any time before third persons' rights intervene, and by any means short of a breach of the peace. *Ib.*
3. *Same. Representations of solvency. Subsequent failure.*  
Goods sold and delivered to a buyer, upon the statement of his son that he is solvent, cannot be reclaimed, although he soon afterwards fails and makes an assignment for the benefit of his creditors. *Ib.*
4. *Rescission by agreement. Re-delivery.*  
In order to revest the property in the seller, on rescission by mutual agreement, delivery and acceptance are as essential as in the original sale. *Ib.*
5. *Same. Acceptance. Rights of third person.*  
Pointing out barrels said to contain liquor is not a sufficient delivery to complete the rescission of the contract as against the buyer's assignee, who obtains possession before the seller accepts them. *Ib.*

See ESTOPPEL; EXECUTION SALE; FRAUDS, STATUTE OF; PRIVILEGE TAX; TAX SALE.

## SAMPLES.

See FRAUDS, STATUTE OF, 4, 5.

## SCIRE FACIAS.

See JUDGMENT, 1.

SEAL.

See CONSIDERATION, 2, 3.

SENTENCE.

See CRIMINAL LAW AND PROCEDURE, 5-11; HABEAS CORPUS, 1.

SEPARATE ESTATE.

See HUSBAND AND WIFE; MARRIED WOMAN.

SERVICE OF PROCESS.

1. *Constructive service. Member of family. Name.*  
A return of service of process by leaving the writ with a member of the defendant's family, over sixteen years of age, is not fatally defective if it does not give the name of such person. *Robison v. Miller*, 237.
  2. *Same. Delivery of writ. Usual place of abode.*  
Such a return is, however, fatally defective unless it states that the delivery was made at the defendant's usual place of abode. *Ib.*
- See DECREE, 1, 2; ESTATES OF DECEASED PERSONS, 3-7; SHERIFF.

SERVITUDE.

See SPECIFIC PERFORMANCE.

SET-OFF.

1. *Action for damages.*  
Set-off is not available in a suit for unliquidated damages. *Burrus v. Gordon*, 93.
2. *Payment by mistake. Bill of exchange.*  
The drawee of two drafts of the same date, amount, maturity, and parties, who accepts one, and afterwards pays the other by mistake, cannot set off such payment in a suit upon his acceptance, where the payment of the unaccepted draft caused a failure to protest it. *Holten v. Davis*, 769.
3. *Mutuality. Notice of assignment. Debt not due.*  
The maker of a promissory note, if sued by its indorsee, cannot set off the payee's note, which he purchased before the former was indorsed, unless the latter note was due when he received notice of such indorsement. *Chambliss v. Matthews*, 306.

4. *Estates of deceased persons.*

A promissory note made by a decedent in his lifetime cannot, by virtue of Code 1871, § 602, be set off against a debt due for part of his estate purchased from his administrator. *Hutch. Code*, p. 854, art. 10; *Mellen v. Boarman*, 13 S. & M. 100, cited. *Bales v. Hyman*, 330.

## SHERIFF.

1. *Motion. Money collected. Defence.*

A sheriff cannot be compelled by motion to pay over money to a judgment creditor who appears by the writ to be entitled to it, while a bill in chancery, filed by a third person claiming the fund, is pending against the creditor and himself. *Howard v. Proskauer*, 247.

2. *Same. Where made. Failure to return execution.*

Motion against a sheriff for failure to return an execution, under Code 1871, § 227, should be made and determined in the court to which the writ is returnable, although the defaulting officer resides in another county, of which he is sheriff. *Cox v. Ross*, 56 Miss. 481, cited. *Tapp v. Bonds*, 281.

3. *Same. Return of nulla bona before return-day. Not within statute.*

Return of the writ, indorsed no property found, within four days after its receipt, and several months before the return-day, will not support a motion under Code 1871, § 227, for failure to return on the return-day. *Ib.*

4. *Same. Expiration of official term. Effect.*

The motion, under Code 1871, § 227, can be maintained against the sheriff and his sureties after his term of office has expired. *Ib.*

See COUNTY CONTRACTOR, 3; LANDLORD AND TENANT, 4; OFFICE.

## SHERIFF'S BOND.

See SHERIFF; TAX COLLECTOR UNDER CODE 1871.

## SIDEWALKS.

See MUNICIPAL CORPORATION, 1-14.

## SLANDER.

1. *Variance. Words used.*

In actions for slander, the exact words charged or synonymous ones must be proved. It is not sufficient that a similar idea is conveyed. *Jones v. Edwards*, 28.

2. *Verdict. Jurors cannot impeach.*

Jury men who in such an action have found one cent damages for the



plaintiff, will not be allowed to impeach their verdict by stating their opinion that such verdict would carry the costs. *Ib.*

8. *Damages. Absence of injury to character.*

The law implies damage from the fact of slander; and it is error to charge that it is for the jury to say from the whole testimony whether the plaintiff's character was injured. *Ib.*

See LIBEL; MALICIOUS PROSECUTION.

SPECIAL JUDGE.

See CRIMINAL LAW AND PROCEDURE, 12.

SPECIFIC PERFORMANCE.

1. *Easement and servitude. Hardship.*

A grant, on valuable consideration, of the right perpetually to lay off new landings, as the river bank caves, to the exclusion of all others, on the water front of a large plantation, near a growing town, is not so unfair that equity will refuse to decree its specific performance. *Carson v. Percy*, 97.

2. *Same. Ambiguity. Right of election.*

The stipulation is sufficiently definite if it provides that the covenantor shall permit the covenantee, when the landing caves, to fix another, not to exceed four acres, at any point on the river front of the plantation, where the public interest may demand. *Ib.*

3. *Same. Vendees of covenantor. Chancery jurisdiction.*

The covenantee can maintain a bill in chancery to enforce the contract against vendees, with notice, of parts of such plantation, who have collected rents from a new wharf, and laid off other ground for landing purposes. *Ib.*

STARE DECISIS.

See VESTED RIGHTS.

STATING ACCOUNTS.

See CHANCERY COURT.

STATUTE.

1. *Construction. Legislative misconception.*

A legislative enactment based on a misconception of the law does not, *per se*, change the law so as to make it accord with the misconception. *Davis v. Delpit*, 25 Miss. 445. *Byrd v. State*, 243.

2. *Repeal. Penalty. Pending suits.*

In the absence of a saving clause, the repeal of a statute imposing a penalty to be recovered by action, or enforced by prosecution, ends all proceedings to enforce it. *Anding v. Levy*, 51.

See CREDITOR'S BILL, 7; MUNICIPAL BONDS; PRIVILEGE TAX.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS; PRIVILEGE TAX, 4.

STATUTORY OFFENCES.

See CONCEALED WEAPONS; CRIMINAL LAW AND PROCEDURE; INDICTMENT; PRIVILEGE TAX; QUARANTINE; RAPE.

STOCKHOLDER.

See CORPORATION.

STOREKEEPER.

See PRIVILEGE TAX.

STREET.

See MUNICIPAL CORPORATION, 1-14.

SUBROGATION.

See FRAUDULENT CONVEYANCE, 3.

SUMMONS.

See CONTESTED ELECTIONS, 6; SERVICE OF PROCESS.

SUPERSEDEAS.

See CONTESTED ELECTIONS, 7, 9; ESTATES OF DECEASED PERSONS, 8, 9.

SUPREME COURT.

1. *New points.*

This court cannot examine the correctness of a verdict, unless exceptions were taken, or a motion for a new trial made in the lower court. *McNairy v. Gathings*, 215.

2. *Jurisdiction. Amount in controversy.*

Under Code 1871, § 1334, the Supreme Court has no jurisdiction of a writ of error in a case where the Circuit Court on appeal from a justice of the peace renders judgment against the defendant for less than fifty dollars, although the plaintiff recovered a larger judgment before the magistrate. *Ward v. Scott*, 826.

3. *Same. Costs.*

Costs are not to be estimated in determining the question of jurisdiction. *Ib.*

4. *Practice. Agreed case. Judgment on reversal.*

Upon reversing the decision of a circuit judge to whom the case was submitted on an agreed statement of facts, the Supreme Court will direct the proper judgment to be entered. *Menken v. Gumbel*, 756

See APPEAL, 4-6; BAIL, 2; CERTIORARI, 3; CHANCERY PRACTICE, 5, 6; ESTATES OF DECEASED PERSONS, 8-10; EVIDENCE, 5; INSTRUCTIONS, 1; LIMITATION OF ACTIONS, 13; NEW TRIAL, 5, 8, 9; UNLAWFUL ENTRY AND DETAINER, 1; VESTED RIGHTS.

## SURETY.

See PRINCIPAL AND SURETY.

## SURVIVING PARTNER.

See ATTACHMENT, 3, 4, 8-10, 13, 14; PARTNERSHIP, 4, 5.

## TAX.

See COUNTY TAX; MUNICIPAL CORPORATION, 1-14; PRIVILEGE TAX; PURCHASER IN GOOD FAITH, 3, 4; TAX COLLECTOR UNDER CODE 1871; TAX SALE; TAX TITLE.

### TAX COLLECTOR UNDER CODE 1871.

1. *Sheriff's bond. Default as tax collector.*

The sureties on a sheriff's bond, under Code 1871, § 219, are liable for his default as tax collector, although he has given a tax collector's bond not required by law. *Harris v. State*, 55 Miss. 50, explained. *State v. Matthews*, 1.

2. *Same. Release of sureties. New bond under Code 1871, § 316.*

Such sureties are not released, nor are additional sureties bound, by erasing the names of the former and substituting those of the latter by direction of the board of supervisors. *Ib.*

8. *Tax collector's bond. Validity. State and county taxes.*

Notwithstanding the omission from the Code of 1871 of the section

requiring from the sheriff a tax collector's bond, the provisions of the Code recognizing such bond render it a valid security for State and county taxes, if voluntarily executed. *State v. Matthews*, 1, explained. CAMPBELL, J., dissented. *State v. Harney*, 863.

4. *Same. Liability of sureties. Alteration.*

The sureties upon a tax collector's bond, imposing on each a several liability for a specific sum, are not bound by an instrument made by a stranger by cutting off their signatures and attaching them to a new bond, which imposes a joint and several liability for the entire penalty. *Ib.*

5. *Same. Change without altering liability. Sureties' agent.*

If, however, the sureties entrust the bond to the tax collector for delivery, and he, or a person employed by him, cuts off the signatures, which he attaches to an exact copy of the bond, made because the original is mutilated, they are bound by the new instrument after acceptance by the State. *Ib.*

6. *Same. Affidavit by sureties. Estoppel.*

Sureties on the bond who, after its alteration, appear before the chancellor clerk, under the act of March 11, 1872 (Acts 1872, p. 30), and sign the affidavit of solvency attached, in which they are described as "sureties on the within bond," are estopped to claim that the paper is not their bond by reason of their ignorance of the change. *Ib.*

7. *Same. Separate justification. Writing names in affidavit.*

The rule is inapplicable to sureties who justify upon a separate paper which is not attached to the bond when the affidavit is made by the others; but it applies to those who write their names in the affidavit after the change in the bond. *Ib.*

8. *Same. Duress. Threatened suit.*

The fact that the sheriff, who has executed a sheriff's bond, is induced to give the tax collector's bond by the board of supervisors threatening to proceed to have the office declared vacant unless he does so, is not such duress as renders the collector's bond a nullity. *Ib.*

9. *Same. County taxes. Illegal levy. Money actually collected.*

Want of power in the tax collector to collect the taxes, by reason of the fact that the levy was not made at the county town (*Johnson v. Futch*, ante, 73), is no defence to a suit on the bond by the county for the money actually collected by him. *Ib.*

See TAX SALE, 1, 2.

## TAX SALE.

1. *Collector cannot purchase.*

A tax collector cannot purchase at his own sale. *McLeod v. Burkhalter*, 65.

2. *Rights of purchaser. Failure to sell at auction.*

The purchaser of a tax title from the State can charge the land under Code 1871, § 1718, if it is in the list of lands sold to the State, although the tax collector, under an agreement with the owner, does not offer it on the sale-day with other lands. *Cogburn v. Hunt*, 681.

3. *Same. Refunding the purchase-money. Charging the land.*

Except in the state of case provided for by Code 1871, § 1719, where the State and county refund the money received by them respectively, the purchaser of land sold for taxes, if from any cause he fails to get title, may charge the land. *Ib.*

See COUNTY TAX; TAX TITLE.

## TAX TITLE.

1. *Board of supervisors. Power to adjourn meeting.*

The board of supervisors having no power to adjourn to a time not appointed by law, a levy of taxes made at an adjourned meeting is void, and a sale therefor passes no title. *Smith v. Nelson*, 138.

2. *Conveyance to State. Auditor's deed. Evidence.*

In an action of ejectment on a tax title purchased by the State for taxes in 1868, the plaintiff cannot recover on the auditor's deed, dated Oct. 24, 1870, alone, but must introduce the deed of the sheriff to the State, required by Code 1857, p. 80, art. 36, as a foundation for the auditor's right to convey. *Weathersby v. Thoma*, 296.

3. *Same. List of lands sold to State.*

The plaintiff in ejectment who relies upon a deed from the auditor must introduce the list of lands sold to the State, in order to show title. *French v. Ladd*, 678.

4. *Same. Certified copy. Evidence.*

A copy of so much of the list as relates to the land in question, accompanied by the auditor's certificate that every thing shown by the list with respect to it is given, is admissible. *Ib.*

5. *Same. Certificate of contents of list.*

The auditor's certificate that the land appears upon the original list as having been sold to the State on a given date for the taxes of a specified year is incompetent. *Ib.*

See CHANCERY, 4, 5; CIRCUIT CLERK, 2; TAX SALE.

## TENANTS IN COMMON.

See PARTITION; PARTY WALL, 1.

## TENDER.

*Mortgage. Discharge of security.*

A mere proposition by the mortgagee, in a mortgage executed to secure

an usurious debt, to pay the debt if the usury is stricken out, without producing the money, or giving time for calculation, is not such a tender as will stop interest, much less is it sufficiently explicit and formal to discharge the mortgage. *Harmon v. Magee*, 410.

#### THREAT.

See CONCEALED WEAPONS; EVIDENCE, 4.

#### TITLE BOND.

See EXECUTION SALE; FRAUDS, STATUTE OF, 1, 2; MARRIED WOMAN, 13.

#### TRADER.

See PRIVILEGE TAX.

#### TRESPASS.

See AGRICULTURAL LIEN, 7, 11; PLEADING, 8; TRESPASS ON THE CASE.

#### TRESPASS ON THE CASE.

*Malicious prosecution. Defective affidavit.*

Trespass on the case lies for malicious prosecution, although the affidavit which was the commencement of the prosecution fails to charge a crime known to the law. *Mask v. Rawls*, 270.

See LIBEL; MALICIOUS PROSECUTION; SLANDER.

#### TRUST AND TRUSTEE.

##### 1. *Resulting trust. Purchase with another's money.*

If a son, to whom his mother has entrusted money to complete the purchase of a tract of land for her, takes title in his own name, and then exchanges it for other land, with her consent, he holds the newly acquired land as trustee for her benefit. *Flynt v. Hubbard*, 471.

##### 2. *Same. Mortgage for value without notice.*

A mortgage executed by the son while holding only a title-bond to the latter land, but after the consideration of the exchange is paid, takes precedence of the resulting trust, if he receives a deed before his mother gives notice of her claim. *Ib.*

##### 3. *Same. Notice. Possession. Mortgage by trustee.*

A resulting trust in favor of a person who occupies land as a residence, in the belief that the title is in himself, will prevail over a mortgage for loaned money executed by the trustee, whose legal title is recorded. *Taylor v. Mosely*, 544.

4. *Same. Advancement. Presumption. Evidence to rebut.*

A purchase of land by one who pays the price and has the title made to another, for whom he is under a legal or moral obligation to provide or towards whom he has placed himself *in loco parentis*, is presumed to be a settlement and not a trust for the purchaser, but such presumption may be rebutted by evidence. *Higdon v. Higdon*, 264.

5. *Same. Presumption of advancement. Subsequent acts.*

A trust does not result, in favor of a brother who purchases a homestead for his sisters to whom he stands *in loco parentis*, and takes the title to the eldest and his aunt, although they subsequently permit him, owing to reverses of fortune, to live and build there, and the aunt reconveys to him her moiety. *Ib.*

See BANKRUPTCY, 1; CIRCUIT CLERK; CREDITOR'S BILL, 3; HUSBAND AND WIFE, 2-6; JUDGMENT LIEN, 2-4; LIMITATION OF ACTIONS, 20; MARRIED WOMAN, 2; OFFICE, 1; PARTIES, 1; PURCHASER IN GOOD FAITH, 1-4.

UNLAWFUL COHABITATION.

1. *Code 1871, § 2486.*

The offence of unlawful cohabitation consists in openly living together as man and wife in illicit intercourse, and it is not necessary that the parties should represent themselves as married. *Carotti v. State*, 42 Miss. 334, explained. *Kinard v. State*, 132.

2. *Marriage. Const., art. 12, § 22.*

The Constitution of Mississippi does not create the relation of husband and wife between persons living together in open concubinage at the date of its ratification. *Floyd v. Calvert*, 53 Miss. 37, cited. *Ib.*

UNLAWFUL ENTRY AND DETAINER.

1. *Writ of error. Supreme Court.*

A writ of error or appeal lies to the Supreme Court, by virtue of Code 1871, §§ 409, 410, 411, from a judgment rendered in the Circuit Court, upon appeal from the special tribunal organized under the act in relation to unlawful and forcible entry and unlawful detainer, which is silent as to the finality of such judgment. *Gill v. Jones*, 367.

2. *Judgment of dismissal. Appeal to Circuit Court.*

A judgment of dismissal, in such a proceeding, by the justices of the peace, for want of prosecution before them, does not conclusively settle the rights of the parties litigant, but is such a final determination of the suit that the Circuit Court has jurisdiction of an appeal therefrom. *Ib.*

3. *Variance. Dower. Description.*

The land described by metes and bounds, in the report of commission-

ers who set off dower, is that to which the widow is entitled, although they state a wrong section; but in her suit to recover the land the defendant can prove the variance, if she does not allege the true section. *Ib.*

4. *Privity.*

Owners of the reversion cannot, after the death of the tenant by the curtesy, maintain unlawful detainer against his lessee. *Wolfe v. Angevine*, 767.

### UNLICENSED TRADER.

See PRIVILEGE TAX.

### USURY.

See TENDER.

### VARIANCE.

*Allegata et probata.*

The proof must conform to the pleadings. *Pierce v. Jarnagin*, 107.

See ADMINISTRATION BOND, 2; ASSAULT, 1; CIRCUIT COURT, 3; SLANDER, 1; UNLAWFUL ENTRY AND DETAINER, 3.

### VENDOR AND VENDEE.

1. *Express lien. How reserved.*

An express lien on land, which will not be lost by assignment, can be reserved in the note for the purchase-money. *Hobson v. Edwards*, 128.

2. *Statute of Frauds. Deceit.*

The vendee of land under a parol agreement can recover only for loss directly incurred by reason of the vendor's fraud, and upon a state of case which would sustain an action for deceit as described in *Sims v. Eiland*, 807. *Cain v. Kelly*, 830.

3. *Same. Parol contract for sale of land. Measure of damages.*

He cannot recover for losses sustained by any thing which occurs between himself and the vendor after he hears of the latter's unwillingness to reduce the contract to writing because of doubt as to his right to sell the land. *Ib.*

See ESTOPPEL, 3; EXECUTION SALE; HUSBAND AND WIFE, 1; LANDLORD AND TENANT, 5; MARRIED WOMAN, 13; PARTITION, 9.

### VENDOR'S LIEN.

See INFANT, 6, 7; INTEREST; REVIEW, BILL OF, 10, 11; VENDOR AND VENDEE, 1.



VENUE.

1. *Replevin.*

Replevin before a justice of the peace may be brought in the county where the goods are found, although the defendant is a resident freeholder and householder of another county. *Cain v. Simpson*, 53 Miss. 521, distinguished. *Ellison v. Lewis*, 588.

2. *Freeholder and householder.*

One who is neither a freeholder nor householder can be sued in any action, wherever he is found. *Ib.*

See ATTACHMENT, 19; SHERIFF, 2; WILL, 4.

VERDICT.

*Surplusage. Damages. Writ of inquiry. New trial.*

The assessment of damages, in a verdict for the plaintiff, although clearly erroneous on its face and based upon improper considerations, cannot, if essential to make the finding responsive to all the issues submitted to the jury, be stricken out as surplusage and a writ of inquiry awarded; but the entire verdict should be set aside, and a new trial granted. *McNairy v. Gathings*, 215.

See ASSIGNEE IN BANKRUPTCY, 2; CRIMINAL LAW AND PROCEDURE, 5-11; EMINENT DOMAIN; JUROR; NEW TRIAL; SLANDER, 2; SUPREME COURT, 1.

VESTED RIGHTS.

1. *Stare decisis.*

Where rights have become vested from transactions under the law, as settled by former decisions, the court should depart therefrom. only in case of clear necessity and positive conviction of error. *Lombard v. Lombard*, 171.

2. *Same. Decision by two judges against one. New judges.*

Conflicting provisions of Code 1871 having been after full arguments construed by a divided court of three judges, GEORGE, C. J., succeeding one of the majority, declined to reopen the question, although presented in a new case, while the two remaining judges adhered to their diverse opinions. *Ib.*

3. *Same. Criminal law.*

No one has a vested interest in an erroneous *dictum* of the appellate court, respecting the crime which he commits while such *dictum* is not overruled. *Lanier v. State*, 102.

WAIVER.

See AGRICULTURAL LIEN, 12, 14; ATTACHMENT, 17; CONTESTED ELECTIONS, 8; PLEADING, 6.

## WAR.

See LIMITATION OF ACTIONS, 19.

## WARRANT.

See MUNICIPAL CORPORATION, 15-17.

## WARRANTY.

See COVENANT.

## WATERCOURSE.

See OBSTRUCTION TO WATERCOURSE.

## WIDOW.

1. *Dower. Collateral heirs.*

The widow of a childless intestate is, under Code 1871, entitled to but half his estate. *CAMPBELL, J.*, dissented. *Gibbons v. Brittenum*, 56 Miss. 232, followed. *Lombard v. Lombard*, 171.

2. *Same. Homestead exemption.*

The widow of a childless intestate is not entitled, under the Code of 1871, to half his land in addition to the homestead, but only to half including the exemption. *Glover v. Hill*, 240.

## WILL.

1. *Requisite formalities.*

A will is invalid unless attested by witnesses or wholly written and subscribed by the maker. *Davis v. Williams*, 843.

2. *Charge of legacies on land. Blending of property.*

Under a will giving the testator's real estate, slaves and personal property to a person who is named as executor, on condition that, at the expiration of five years, he will pay, or cause to be paid, certain sums of money, the legacies are a charge on all the property alike. *Turner v. Turner*, 775.

3. *Same. Land sold under power. Freed from charge.*

Land sold by the devisee and executor in pursuance of a power conferred on him by the will to sell, "in order to obtain money to pay the above legacies, or for any other purposes that he may think advantageous to himself," is not subject in the hands of his vendees to a charge for the legacies. *Ib.*

4. *Same. Suit for legacy. Chancery jurisdiction.*

The Chancery Court, in which the will is admitted to probate, has jurisdiction of a suit by the legatees for sale of the land and payment of

the legacies, by virtue of Code 1871, § 977, although, owing to a subsequent establishment of another chancery district in the county, the land lies and the parties live in the latter district. *Ib.*

5. *Devisavit vel non. Demurrer to evidence.*

A demurrer to the evidence on the trial of an issue *devisavit vel non* is admissible. *Broach v. Sing*, 115.

6. *Nuncupative will. Animus testandi. Rogatio testium.*

The statement of a sick person, that she wants her husband to have her property, although made in the presence of two witnesses, cannot be probated as her nuncupative will, if she neither mentions a will nor calls on any one to note her language. *Ib.*

7. *Same. Leading question.*

If such witnesses signed a written statement, purporting to contain the testatrix's words and to set forth the attendant circumstances, the question whether the statement is true, addressed to one of them, by the petitioner, on the trial of the issue *devisavit vel non*, is properly rejected as leading. *Ib.*

See BEQUEST; MARRIED WOMAN, 1-3.

## WITNESS.

1. *Competency. Husband and wife. Criminal law.*

Under Code 1871, § 759, a wife is not a competent witness against her husband who is on trial for felony. *Byrd v. State*, 243.

2. *Same. Estates of deceased persons.*

On the trial of exceptions to a final account, creditors of the testator are competent witnesses, under Code 1871, § 758, and the amendment (Acts 1878, p. 190), as to the propriety of the executor's action in paying their demands, which were not probated. *Gordon v. McEachin*, 834.

3. *Same. Executor. Claim existing in lifetime of testator.*

The executor is not a competent witness, in such a proceeding, to establish his claim against the estate, if it existed in the testator's lifetime. *Ib.*

4. *Same. Assignment of claim.*

The object of the amendment of 1878 is to prevent the original claimant from testifying to establish a claim against the estate in a suit by a person to whom he has assigned it after the testator's death in order to be a witness as it was shown he could do in *Rothschild v. Hatch*, 54 Miss. 554. *Ib.*

5. *Impeaching credibility. Former contradictory statement.*

While a conflicting statement on a former trial may be proved to discredit a witness, counsel's comment on the improbability of the first

statement is inadmissible in evidence to show motive for the change in testimony. *Cannon v. State*, 147.

6. *Same. Animus. Motive for varying evidence.*

Nor can the fact be proved that a medical expert was not examined on the former trial to show the impossibility of what the witness then stated, although he was examined at the present trial, when the witness made a different statement. *Ib.*

7. *Same. Bias. Contradiction of answer.*

But when the witness, in attempting to explain how he came to make variant statements, denies a fact bearing on the admitted variance, *semble* that the fact denied may be proved. *Ib.*

See CRIMINAL LAW AND PROCEDURE, 3, 4; EVIDENCE, 2-4; HABEAS CORPUS, 3, 4; JUDICIAL DISCRETION; PERJURY; WILL, 1, 6, 7.

### WRIT OF ERROR.

See NEW TRIAL, 6; SUPREME COURT, 2, 3; UNLAWFUL ENTRY AND DETAINER, 1.

### WRIT OF INQUIRY.

See VERDICT.

### WRIT OF SEIZURE.

See AGRICULTURAL LIEN.

### WRITTEN INSTRUMENT.

See CONSIDERATION, 1-3; EVIDENCE, 1; FRAUDS, STATUTE OF; WILL, 1.

### YELLOW FEVER.

See ATTACHMENT, 4; CHANCERY PRACTICE, 4; CIRCUIT CLERK, 3; QUARANTINE.

*2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100*

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